Supreme Court, U.S.
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92-385

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH E. OSCAR and CHARLES SPINOSA,
Petitioners,

v.

UNIVERSITY STUDENTS CO-OPERATIVE ASSOCIATION,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner sustained an injury to property which would entitle her to use RICO, 18 U.S.C. 1961 *et. seq.*, to recover for damages caused by the prohibited racketeering activities (narcotics trafficking) of her next door neighbors, a student housing co-op.

2. Whether the Petitioner, simply because she is a tenant in an apartment building and not a property owner, is being denied the equal protection of the law by being precluded from using RICO to attack her neighbors' racketeering activities (narcotics trafficking).

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OPINIONS BELOW

The Panel Opinion of the Court of Appeals (Appendix B, *infra,* at 5a) is reported at 939 F.2d 808.

The En Banc opinion of the Court of Appeals (Appendix C, *infra,* at 21a) is reported at 92 Daily Journal D.A.R. 7612, and scheduled to be reported at 965 F.2d 783.

The Memorandum and Order of the District Court (Appendix A, *infra,* at 1a) is unreported.

JURISDICTION

The En Banc judgment of the Court of Appeals was entered on June 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. 18 U.S.C. §1961(1)-(5) states:

> (1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating

to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the

United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

2. 18 U.S.C. §1964(c) states:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

3. The Fourteenth Amendment to the Constitution of the United States, states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On June 19, 1989, Petitioner[1] filed a Compiaint against Respondent, in the United States District Court for the Northern District of California, seeking damages based on Respondent's operation, next door to her, of a student co-operative housing association allegedly rife with narcotics trafficking.

By February 22, 1990, Petitioner had filed a Third Amended Complaint in the District Court. The Third Amended Complaint stated four causes of action: racketeering under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1961, *et seq.*, and three pendent state law claims for intentional tort, negligence and breach of contract. The Third Amended Complaint set forth a litany of allega-

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[1]Petitioner, Ruth E. Oscar, was a Co-Plaintiff with Charles Spinosa, who is filing a separate Petition for Writ of Certiorari.

tions regarding a long-term and highly organized narcotics trafficking operation, operating at Barrington Hall, a student co-op operated by Respondent. This Complaint named individuals with street names such as "Ice-pick Al", "Skateboard Kenny", "MaryBeth a/k/a "Scarymeth", "Pink Cloud" and "Mushroom Dave" as some of the participants in the alleged narcotics trafficking enterprise.

The Respondent filed a Motion to Dismiss the Third Amended Complaint, claiming that Petitioner did not sufficiently plead that the alleged pattern of racketeering (narcotics trafficking) was the proximate cause of her damages. The District Court granted this Motion on May 3, 1990.

On appeal, the United States Court of Appeals for the Ninth Circuit, in a 2-1 majority opinion delivered by Judge Kozinski, reversed in part the Order of the District Court, and remanded the case for further proceedings. The Opinion by Judge Kozinski stated that the Petitioner and her Co-Plaintiff, as persons who had "paid good money for their leasehold interests," which included the property right of quiet enjoyment, had sufficiently stated a claim under 18 U.S.C. §1964(c) because they had a property right that was allegedly harmed by the claimed racketeering activities of Respondent.

In response to the argument of Respondent that the injuries suffered by Petitioner were personal in nature and not cognizable under RICO, the Court stated that Petitioner's loss of the right to the use and quiet enjoyment of property

was economic and that there was no doubt that a leasehold in an ordinary apartment was worth more than a leasehold in a unit besieged by narcotics traffickers.

Judge Rymer dissented, stating that the Petitioner did not have a property interest cognizable under RICO, and that her remedies should be limited to a state court nuisance action. The dissent believed that the injuries suffered by Petitioner were personal.

On August 9, 1991, Respondent petitioned the Appeals Court for an En Banc hearing, asserting, among other claims, that the Petitioner failed to allege that her lease was marketable and that the Panel Opinion conflicted with other decisions of the Ninth Circuit Court of Appeals. The Court granted an En Banc rehearing, and received briefs from the parties discussing whether or not the injuries claimed by Petitioner were personal injuries, not cognizable under RICO, or were injury to property, which is cognizable under RICO. The briefs also discussed the Berkeley, California Rent Control Ordinance and whether or not the Petitioner could suffer economic harm to her leasehold interest.

In an 8-3 decision entered June 4, 1992, the En Banc panel reversed the 2-1 panel decision. The majority opinion of the En Banc panel, authored by Judge Nelson, stated that the injury claimed by Petitioner, namely the loss of the enjoyment of her leasehold interest, was a personal injury for which no recovery was available pursuant to 18 U.S.C. §1964(c). Citing, *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th

Cir. 1990), Judge Nelson stated that even though Petitioner's injuries may flow from a valuable property interest, they do not constitute a claim for an injury to property as section 1964(c) requires.

In the dissenting opinion authored by Judge Kleinfeld, the minority cites *Jenkins v. McKethen*, 395 U.S. 411 (1969), and states that the procedural posture of the case requires the court to assume the truth of the averments in the complaint for the purpose of determining whether they state a claim for relief.

> We must therefore assume that USCA intentionally aided, abetted and conspired in the sale of LSD, methamphetamine and heroin at Barrington Hall. We must assume that Oscar and Spinosa rented apartments in an adjacent building and that Oscar rented off-street parking. Unless it is beyond doubt that plaintiffs could prove no facts in support of this proposition, we must assume that, as the complaint avers, the racketeering activity "negatively affected the value of the plaintiffs' property interest in their apartments." The drug dealing, we must assume, generated fear in people entering Oscar's and Spinosa's building, caused risk of disease from discarded hypodermic needles, and caused filth, urination on tenants' cars, noise, and deposits of garbage, feces, vomit and the deposition of bodies of overdosed drug users on the common parts and parking areas of the building where Oscar and Spinosa lived. Assuming that these things are

> true, we must decide whether this claim is one upon which relief could be granted under RICO.

(Appendix C at 31a).

The minority distinguished *Berg* because it was a summary judgment case, not a Rule 12(b)(6) case, and because the Plaintiffs suffered no monetary losses in that case.

In discussing whether Petitioner had a property interest in her leasehold subject to being injured by prohibited racketeering activities, the minority cited *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992), and *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) to illustrate that the proximate causation element of the Clayton Act, 15 U.S.C.S. §15, was incorporated into Section 1964(c)[2], and that after *Holmes* and *Reiter*, it could not be disputed that injury to a non-commercial possessory interest in real estate is injury to property.

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[2]The relevant language of 15 U.S.C.S. §15, set forth below, is almost identical to section 1964(c)

> (a) Amount of Recovery; Prejudgment interest
> Except as provided in subsection (b) of this sections, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The minority went on to state that the majority was seven centuries too late to characterize nuisance as injury to person rather than to property. The minority emphasized that the injury complained of (loss of use and enjoyment of property) could not be called a "personal" injury, even if it appears to have some of the same attributes.

Regarding the damages alleged by Petitioner, the minority stated that expert testimony could be utilized to address this issue, even though the fact that Petitioner lived in a rent controlled building would cause the expert testimony to differ from that based on a free market.

Finally, the minority concludes that Congress intended for RICO to be used by persons, as private attorney generals, to rid their neighborhoods of the trade in narcotics.

> The operation of a massive drug distribution enterprise is exactly the kind of harm against which RICO, with its breadth and draconian penalties, can be useful. Applied in favor of tenants against neighboring drug dealers. RICO is a device for enabling people -- including people who may be too poor to own their homes -- to fight and destroy the social pathologies that deprive them of liberty and diminish the quality of their lives.

(Appendix C at 54a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals has erroneously decided a question of great national importance regarding the intent of Congress in battling the "trade in narcotics" that "causes whole cities virtually to be trapped in their homes by fear of" the maladies associated with drug use. *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 86-87 (1970) (statement of Senator McClellan, the sponsor of S. 30).

In addition, the Court of Appeals has erroneously redefined the concept of property in contravention of the definition approved by the Supreme Court, thereby unconstitutionally depriving millions of tenants of the right to use RICO to seek recovery for injuries caused to their leasehold interests by racketeering activities. *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

1. In *Holmes*, the proximate causation element of the Clayton Act, 15 U.S.C. §15, was incorporated into Section 1964(c). *Reiter* is the leading Clayton Act case. In rejecting the defendant's contention that property must be commercial in nature, the *Reiter* court stated:

> The word "property" has a naturally broad and inclusive meaning. In its dictionary definitions

> and in common usage "property" comprehends anything of material value owned or possessed.

Id. at 338.

Holmes and *Reiter* clearly stand for the proposition that injury to a non-commercial possessory interest in real estate is injury to property. There is no question in this case that the Petitioner's leasehold interest in her apartment is an estate in land and, therefore, "property". *Jones v. Kelly*, 280 P.2d 942 (Cal. 1929); *Restatement of Property*, 19-20 (1936); and *Stoiber v. Honey Chuck*, 162 Cal.Rptr. 194 (Cal.App. 1980).

Since at least the time of Blackstone, it has been held in the common law that one who is the victim of a nuisance interfering with their use and enjoyment of their property (including leasehold interests) is suffering an injury to "property". J.W. Ehrlich, *Ehrlich's Blackstone* 581 (1959).

As the minority En Banc opinion accurately stated:

> The connection between the tort of nuisance and the enjoyment and peace of mind of the possessor of land does not make plaintiffs' claim one for personal injury, as the majority opinion suggests. The word "enjoyment" is just the ancient common law term of art describing one of the tenant's property rights inhering in the nature of his estate. "The essence of a private nuisance is an interference with the use and enjoyment of land." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, §87, at 619 (5th ed. 1984). Though the description of the interest harmed as "use and

> enjoyment" might seem to imply that disturbance of the interest would be an injury to the person, "the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke." *Gardiner v. William S. Butler & Co.*, 245 U.S. 603, 605 (1918) (Holmes J.). "The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." Keeton, *supra*, §87, at 619.

(Appendix C at 39a and 40a).

In footnote 2 of its Opinion (Appendix C at 26a), the Court of Appeals intimates that if the Petitioner were a property owner instead of a tenant, her claim might survive the proximate causation requirements of RICO. The Court of Appeals further distinguishes Petitioner because of her status as a tenant when it states:

> We do not intend to denigrate the severity of the problems Oscar has alleged or the harm inflicted on her. It is clear, however, that any injury she has suffered is at core an intangible personal injury, not a financial loss to property. Oscar can recover for such injuries under any one of a myriad of state law causes of action. She cannot do so under RICO however.

(Appendix C at 28a).

By defining a tenant's leasehold interest as something other than property subject to being injured within the meaning of Section 1964(c), and by defining the Petitioner's

injury as personal instead of injury to property, the Court of Appeals has improperly created a group of second-class people, tenants. If allowed to stand, this decision will unconstitutionally deprive millions of individuals of the equal protection of the laws. There is no rational basis for disallowing tenants the right to use RICO to seek redress for damages done to their leaseholds by racketeering activities. "Equal protection of the laws means the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). It forbids all invidious discrimination but does not require identical treatment for all persons without recognition of differences in relevant circumstances. It requires

> that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

Barbier v. Connolly, 113 U.S. 27, 31 (1885).

No distinct "racketeering injury" requirement is necessary to maintain a private treble damages action under the Racketeer Influenced and Corrupt Organizations Act; if defendant engages in a pattern of racketeering activity in a manner forbidden by Section 1962 and the racketeering activities injured the plaintiff in his business or property, the plaintiff has a private claim for treble damages; disavowing *Alexander Grant & Co. v. Tiffany Industries,* Inc., 742 F.2d 408 (8th Cir. 1984); *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2nd Cir. 1984) and result reached in *Furman v. Cirrito,* 741 F.2d 524 (2nd Cir. 1984). *Sedima, S.P.R.L. v. Imrex Co., Inc.,* N.Y. 1985, 105 S.Ct. 3275, 473 U.S. 479, 87 L.Ed.2d 346, dissenting opinion 105 S.Ct. 3292, 473 U.S. 479, 87 L.Ed.2d 361.

Like the successful RICO plaintiff in *Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.,* 585 F.Supp. 23 (D.C. Ga. 1983), who alleged a loss in the value of her property (stock) to meet the requirements of §1964(c), Petitioner has alleged a monetary loss due to the negative effects of prohibited racketeering activity on her leasehold interest. Petitioner has adequately alleged the suffering of damages, and the minority opinion of the Court of Appeals fully discusses the nature and calculation of these damages (Appendix C at 42a - 49a).

2. An organized narcotics trafficking operation is precisely the type of enterprise to which Congress intended RICO to apply. This trafficking is a prohibited racketeering activity pursuant to Section 1961, and it can cause damage to property owners and tenants within the meaning of Section 1964(c). *Organized Crime Control, supra.*

Congress intended the Racketeer Influenced and Corrupt Organizations Act's civil remedies to help eradicate organized crime from the social fabric by divesting the illegal enterprise of the fruits of its ill-gotten gains. *Genty v. Resolution Trust Corporation*, 937 F.2d 899 (3d Cir. 1991).

It also makes for a sound national policy to attack the narcotics trade, using RICO and its draconian penalties, by permitting neighbors of crack house operators and narcotics dealers to take away ill-gotten profits and property.

From an economic standpoint, many tenants are trapped living in neighborhoods infested with narcotics traffickers. RICO provides them with a tool to destroy this blight and permit them to live in neighborhoods free from this activity, like millions of more affluent property owners.

CONCLUSION

For all the reasons discussed herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Memorandum and Order of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUTH E. OSCAR and CHARLES SPINOSA,
Plaintiffs,

vs.

UNIVERSITY STUDENTS
COOPERATIVE ASSOCIATION,
Defendant

No. C-89-2117 SAW

Entered into Civil Docket May 4, 1990

MEMORANDUM AND ORDER

Plaintiff Oscar rents an apartment in a building at 2321 Dwight Way, Berkeley, California which is adjacent to Barrington Hall, a student residence facility owned and operated by defendant University Students Cooperative Association ("USCA"). Plaintiff Spinosa formerly rented an apartment in the same building.[1] USCA is a non-profit cooperative membership corporation that provides housing to more than 1500 persons in Berkeley.

Plaintiffs allege that USCA aided and abetted, concealed, and encouraged drug use and dealing at Barrington Hall. Plaintiffs also allege that USCA obstructed police investigations at Barrington Hall and encouraged tenants to pay rent in drugs. Plaintiffs charge that these alleged actions by USCA injured them in the quiet enjoyment of their leasehold

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[1]Spinosa also rented a carport at 2321 Dwight Way.

interests.[2] Plaintiffs also contend that these actions negatively affected the value of their property interests because the actions themselves and the burglary and violence a reasonable person would associate with such activities and the posting of guards at the entrance at Barrington Hall reduced the desire a reasonable person would have to rent them. Plaintiffs also contend that the drug related activities at Barrington Hall proximately caused threatening of residents, noise, filth and garbage being thrown on 2321 Dwight Way, and other nuisances.

Plaintiff brings a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, two state law nuisance claims, and a breach of contract claim. Defendant moves to dismiss for failure to state a claim.

I.

RICO provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains . . ." 18 U.S.C. § 1964. Section 1962 provides that

> It shall be unlawful for an person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

18 U.S.C. § 1962(c). Defendant moves to dismiss this claim for failure to state a claim. Defendant contends that plaintiffs have not sufficiently pled that defendant's alleged violations under RICO *caused* the alleged injury to plaintiffs. Defendant

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[2]Plaintiffs never clearly set forth precisely what their property interests in their apartments were or are. Plaintiffs have not indicated if their tenancies were governed by a written lease, whether they had the right to sublet, or how any rent control legislation affects their rights.

also contends that plaintiffs have not alleged that they were "commercially" injured, and thus, cannot recover under RICO. Further, defendant contends that plaintiffs' state law claims are barred by the statute of limitations.

To state a claim, plaintiffs must plead a violation of § 1962 by defendants which *causes* an injury in their business or property. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Plaintiffs have pled a violation of § 1962(c) by defendants.[3] However, although plaintiffs have attempted to do so, they have failed sufficiently to plead that the alleged injury to their property *was proximately caused by* defendant's alleged violation. In essence, plaintiffs have pled that defendant aided and abetted the sale and use of drugs at Barrington Hall, and that the existence of such drug use and transactions damaged them by reducing the value of their apartments because a reasonable person would find them less desirable to rent. Plaintiffs have also pled that the alleged drug use and transactions caused garbage to be thrown on the property in which their apartments were located, noise, and other nuisances.

On this basis, the Court finds that such alleged pattern of racketeering activity by defendant under § 1962(c), does not,

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[3]To plead a violation of § 1962(c) by defendants, plaintiffs must allege (1) the existence of an enterprise which affects interstate or foreign commerce, (2) that the defendants were employed by or associated with the enterprise, (3) that the defendants participated in the conduct of the enterprises affairs, and (4) that the participation was through a pattern racketeering activity. *Virden v. Graphics One*, 623 F.Supp. 1417, 1431 (C.D. Cal. 1985) (*see* cases cited therein).

Plaintiff alleges the existence of several enterprises run by various individuals at Barrington Hall to illicitly distribute drugs. Plaintiff also alleges that these enterprises affected interstate commerce in that the source of the drugs they sold was outside California. Further, Plaintiff alleges that defendant was associated with such enterprises' affairs through a pattern of racketeering acts, namely, aiding and abetting the illicit sale of drugs on several occasions.

in itself, as a matter of law, sufficiently present proximate causation of the injury plaintiffs allege.[4] The causation plaintiffs have pled in tenuous. Viewed critically, plaintiffs do not actually allege causation by defendant. Actually, plaintiffs allege that defendant's drug related activities gave rise to burglaries and violence and other actions by other parties, which, in turn, caused loss of the quiet enjoyment and reduction in the value of plaintiffs' apartments, and other nuisances. Thus, plaintiffs have not pled, as the Supreme Court has required, that they have been injured "by the conduct constituting the violation." *Sedima, supra* at 496. Thus, plaintiff fails to state a claim under § 1962(c) of RICO, and the Court should dismiss the plaintiffs' RICO claim.

II.

Defendant argues that since dismissal of plaintiff's RICO claims is proper, this Court lacks pendent jurisdiction over plaintiff's state claims. Defendant's contention is well-taken. *United Mine Workers of America v. Gibbs*, 283 U.S. 715, 726 (1966). Therefore, the Court dismisses plaintiff's remaining state claims as well for lack of jurisdiction.[5]

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss is GRANTED.

Dated: May 3, 1990

/s/ Stanley A. Weigel, Judge.

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[4]Therefore, the Court does not reach the defendant's contention that plaintiffs do not sufficiently allege injury in their business or property because they have not alleged commercial injury.

[5]Plaintiff may, of course, pursue such claims in state court. The Court here does not reach defendant's contention that plaintiffs' state claims are barred by the statute of limitations.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 90-15750

Ruth E. OSCAR; Charles Spinosa,
Plaintiffs-Appellants,

v.

UNIVERSITY STUDENTS
CO-OPERATIVE ASSOCIATION, George Proper, et al.,
Defendants-Appellees.

No. 90-15750.

Appeal from the United States District Court
for the Northern District of California.

Argued and Submitted June 13, 1991.
Decided July 26, 1991.
As Amended Oct. 29, 1991.

Before BRUNETTI, KOZINSKI and RYMER, Circuit Judges.

KOZINSKI, Circuit Judge.

If Berkeley, California, was the last bastion of sixties counterculture, Barrington Hall, the city's oldest and largest student housing co-operative, was surely the last rampart. While much of Berkeley became stuffy and conventional, the residents of Barrington Hall clung to their freewheeling ways. A bit too freewheeling, according to two of Barrington's neighbors. They claim that the co-op's denizens engaged in massive drug-law violations, turning the neighborhood into a drug-enterprise zone. This, they allege, interfered with the use and enjoyment of their property. We consider whether

they state a claim under RICO, 18 U.S.C. §§ 1961-1968.[1]

Facts

Barrington Hall's reputation was larger than life, even by California standards. Known across the country as a "drug den and anarchist household," Barrington Hall prided itself on fostering alternative lifestyles. S.F. Chronicle, April 9, 1990, at B3, col. 1. Its bizarre and irreverent rituals included nude dinners with themes like Satan's Village Wine Dinner and the Cannibal Wine Dinner--the latter complete with body-part shaped food. "It was hard on us vegetarians," sniffed one former resident. *Id.* at B4, col. 1.

These bacchanalian festivals often turned riotous. Objects, ranging from bottles to clothes dryers, were thrown out of the building into the yards and homes of neighbors. And in keeping with the counterculture motif, drug use and distribution were common: Plaintiffs allege that no fewer than 19 different enterprises and individuals--with colorful names like "Mushroom Dave," "Icepick Al," "Onngh Yanngh," and "Marybeth (a.k.a. Scarymeth)"--used Barrington Hall as a base for dealing drugs such as LSD, heroin and methamphetamine. Third Amended Complaint ¶¶ 21-39, ER 7-11; see also S.F. Chronicle, April 9, 1990, at B4, cols. 1-3 (mentioning the presence of drugs at Barrington Hall).

Even as Berkeley gentrified and grew more conservative, Barrington Hall remained "a place where revolutionary expression was encouraged and often taken to the extreme."

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[1]For the sake of brevity, we refer to the residents of Barrington Hall and defendants together as Barrington Hall. At this stage, there is no reason to distinguish between them: If the complaint's allegation of conspiracy and aiding and abetting are taken as true, see Third Amended Complaint ¶¶ 7-20, ER 3-7, defendants and Barrington Hall's residents are liable for each other's conduct. 18 U.S.C. § 1962(d) (conspiracy to violate RICO unlawful); *Petro-Tech, Inc. v. Western Co.*, 824 F.2d 1349, 1356-62 (3d Cir.1987) (aiders and abettors liable under civil RICO as principals).

Id. at B3, col. 1. Barrington Hall was, according to the graffiti on its walls, "An Oasis of Madness in a World Gone Sane." *Id.* at col. 2-3 (photo).

The neighbors were not amused. They blame Barrington Hall for all sorts of social problems, including crime and litter. They also claim that the co-op's residents conducted drug deals and posted look-outs in front of plaintiffs' apartments, bothering them and making it look like they, too, were dealing drugs; and that Barrington's residents, to avoid publicity and conceal their illegal activity, regularly dumped the bodies of persons suffering drug overdoses onto the sidewalks near neighboring apartments.

Two neighbors, plaintiffs Ruth Oscar and Charles Spinosa, filed this suit, charging that the drug-dealing constituted a racketeering enterprise which injured their property. They asked for triple damages under RICO plus recovery on an assortment of pendent state claims. Barrington Hall itself has since gone the way of love-ins and strawberry wine: Defendant University Students Co-operative Association, which owned and operated Barrington Hall, closed the co-op's doors in December of 1989. S.F. Chronicle, July 10, 1990, at A3, col. 1. But this suit remains, proving once again that there is strife after death.

Discussion

Under civil RICO, persons injured in their "business or property" by a pattern of racketeering activity can recover treble damages and the cost of suit, including attorney's fees. 18 U.S.C. §§ 1962(c), 1964(c). Everyone agrees that the repeated sales of narcotics alleged by plaintiffs amounts to a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(1)(D), (5). Defendants dispute, however, whether plaintiffs adequately pleaded an injury to business or property, and whether their injury was caused by the racketeering activity. The district court agreed with defendants that causation was not sufficiently pleaded and dismissed the complaint.

Plaintiffs declined the opportunity to amend and brought this appeal instead.

I

The first question is whether plaintiffs have alleged an injury to "business or property" that will support a RICO claim. 18 U.S.C. § 1964(c); *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, 105 S.Ct. 3275, 3284, 87 L.Ed.2d 346 (1985).

[1] A. Defendants claim that plaintiffs had no property interest at all, much less one that was injured. They point out that plaintiffs didn't own their apartments; they merely rented them. *See* Third Amended Complaint ¶¶ 51-55, ER 14-15 (alleging that plaintiffs have leasehold interest in their apartments and parking spaces). According to defendants, this means that plaintiffs had no property interest that could have been harmed.

[2]-[4] While federal law controls most questions under RICO, whether a particular interest amounts to property is quintessentially a question of state law. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) ("The hallmark of property ... is an individual entitlement grounded in state law...."); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (property interests "are created and their dimensions are defined by" sources "such as state law."); *Milens v. Richmond Redev. Agency*, 665 F.2d 906, 909 (9th Cir.1982) ("We look to local state law to determine what property rights exist...."). Under California law, lessees such as plaintiffs do have a property interest in their apartments. *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal.App.3d 116, 125, 99 Cal.Rptr. 350, 356 (1971); *see* W.P. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 87, at 621 (5th ed. 1984) (any interest sufficient to be dignified as a property right--including a tenancy for a term or a week-to-week tenancy--will support action for interference with its enjoyment). Not even the landlord may lawfully interfere with that

property right. *See Brown Derby Hollywood Corp. v. Hatton*, 61 Cal.2d 855, 858, 395 P.2d 896, 898, 40 Cal.Rptr. 848, 850 (1964) (tenant right to possession and enjoyment). This makes sense. One who has paid to use and possess property--even if only for a limited time--is entitled to it for that period and state law protects that right from unjustified interference.[2]

Of course, the limited nature of plaintiffs' property right will affect the amount of their recovery; they are entitled to compensation only for the loss of "market value of [their] term, but not for that of the reversion, in which [they had] no interest." W.P. Keeton, *supra* § 87, at 621 (footnotes omitted). But that's a question of damages; it doesn't affect whether there was a property interest in the first place.

[5] B. Defendants have a back-up argument, however: Even if plaintiffs had a property interest, it wasn't the type of interest RICO protects. RICO, they claim, protects only business property; it doesn't extend to property owned for noncommercial purposes. *See Van Schaick v. Church of Scientology*, 535 F.Supp. 1125, 1136 (D.Mass.1982). The language of the statute is to the contrary; it requires an injury to "business *or* property." 18 U.S.C. § 1964(c) (emphasis added). Nothing in the statute requires that the property be commercial. Indeed, by referring to business or property in the disjunctive, Congress must have meant for the terms to cover different (though perhaps overlapping) concepts. Under defendants' proffered reading, the term property would be subsumed entirely within the term business and the disjunctive "or" would be rendered meaningless. Normal principles

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[2]Plaintiffs have alleged other types of property damages as well. For example, they claim that persons acting on behalf of defendants wrote "Go Die" in indelible ink on plaintiff Oscar's car. Third Amended Complaint ¶ 73, ER 19. However, these allegations don't appear in the RICO portion of the complaint. The complaint also fails to allege that the acts were connected with the racketeering activity. Accordingly, we infer that the loss of use and enjoyment is the only injury to property plaintiffs allege under RICO.

of statutory construction preclude such an interpretation. *See Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir.1988); 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (4th ed. 1984).[3]

[6] C. So we turn to defendants' back-up to their back-up argument, which runs something like this: Plaintiffs didn't lose the right to live in their apartments; they just lost a portion of the enjoyment they would normally derive from living there. This, defendants contend, is not the loss of a property right at all; it is merely a personal injury. And the established law of this circuit is that personal injury alone will not support a RICO claim. *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990).

Berg does not control this case. The plaintiffs in Berg claimed that the defendants had caused their insurance policy to be cancelled. *Id.* Even though the policy was property, we concluded that the plaintiffs suffered no financial harm: They paid no damages while uninsured and then replaced the policy at no extra cost. *Id.* at 465. What they sought was compensation for the stress of having been without insurance. *Id.* at 464. This, we held, was personal injury not damage to property, and therefore not cognizable under RICO. *Id.*

In contrast, plaintiffs here do not seek RICO damages for emotional distress, loss of sleep or any other personal injury caused by Barrington Hall's activity. Their loss is economic: They paid good money for their leasehold interests, which included a right to the use and enjoyment of their property. W.P. Keeton, *supra* § 87, at 619 (undisturbed enjoyment inseparable from ownership of property); *see also People v. Mason*, 124 Cal.App.3d 348, 352-53, 177 Cal.Rptr. 284 (1981); R. Boyer, H. Hovenkamp & S. Kurtz, *The Law of Property* §

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[3]Defendants' position is remarkably like that of the dissent in *Sedima*, 473 U.S. at 521, 105 S.Ct. at 3302 (arguing that only businesses may bring RICO claims).

11.1, at 404-05 (4th Ed.1991); *cf. Katenkamp v. Union Realty Co.*, 6 Cal.2d 765, 773-75, 59 P.2d 473 (1936) ("It is an axiom of law that one must use his property in a manner which does not unnecessarily damage the property of others, or diminish their equal right to the full enjoyment thereof."). But, as a result of defendants' alleged racketeering activity, they were denied one of the sticks in the bundle which made up their property-- the right to its use and enjoyment. R. Boyer, *supra* § 11.1, at 404-05; *see also United States v. Causby*, 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206 (1946) (overflight of aircraft "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" is a taking of property). And the loss of that right is clearly economic: There can be no doubt that a leasehold in an ordinary apartment is worth more than a leasehold in a unit besieged by narcotics traffickers.

Plaintiffs' injury is conceptually no different than if a portion of their apartments had been flooded or damaged by fire. It would be possible, in either of these cases, to characterize the injury as merely psychic: The lessees are still entitled to live there; they just won't enjoy it as much. Indeed, just about any injury to property (except theft of the property itself) could be characterized the same way: You still own the pile of scrap metal lying by the side of the freeway, but you won't derive the same pleasure from it as when it was a brand-new Maserati.

[7] This argument need not detain us. Even if the harm inflicted by the damage to property is psychological to some extent, the victim can still bring a RICO claim for the injury to the property itself; although the emotional injury is not compensable, the loss of or damage to property is. Thus, RICO entitles the owner of the Maserati to recover triple the value of the ruined car; but it gives him nothing for the pain and suffering of having watched his dream machine reduced to a heap of rubble. Similarly, plaintiffs cannot recover under RICO for their suffering and emotional distress. But they *can*

recover for the diminution of the fair market value of their property interest.[4] They ask for no more, *see* Third Amended Complaint ¶ 53, ER 15; and they're entitled to no less.[5]

II

Having concluded that plaintiffs sufficiently pleaded an injury to business or property, we now address the issue of causation. In doing so, we note that plaintiffs have alleged the type of unlawful conduct that lies at the heart of RICO: The sale of illegal drugs and the crime and violence associated therewith. This is not a case where an enterprising lawyer has converted a business tort into a federal case; nor is it an ordinary landlord-tenant dispute run amok. Instead, plaintiffs allege precisely the type of conduct RICO was meant to deter--the continuous operation of a drug distribution enterprise. *See* 18 U.S.C. § 1961(1)(D), (5).

[8] A. Plaintiffs blame the occupants of Barrington Hall for

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[4]Some of the alleged actions may have caused both psychic and property damage. Thus, plaintiffs allege that various defendants threatened them in order to protect the racketeering enterprise. Third Amended Complaint ¶ 16, ER 4-5. To the extent these threats interfered with plaintiffs' enjoyment of their property and decreased its fair market value, they are cognizable under RICO; to the extent they merely caused plaintiff's emotional distress, RICO does not provide a remedy.

[5]Defendants also argue that plaintiffs' harm is not financial because Berkeley's rent control ordinance prohibited plaintiffs from selling their interests. But the requirement that plaintiff have a financial interest has no independent statutory significance; it is merely another way of articulating the requirement that plaintiff must suffer an injury to property. Under California law, a thing may be property even if it is not marketable and has no exchange value. 4 B.E. Witkin, *Summary of California Law* § 3, at 10 (9th ed. 1987). For example, an inalienable life estate is property. *See In re Hendy*, 118 Cal. 656, 658, 50 P. 753 (1897); *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 186, 155 P. 995 (1916). As we have already concluded, plaintiffs' interest does amount to a property interest under the applicable state law.

a multitude of misdeeds, from assault to vandalism;[6] their complaint reads more like an enumeration of the ten plagues than a pleading in federal court. Obviously, defendants aren't liable for every social ill in the neighborhood; RICO liability is expansive, not unlimited. Under RICO, defendants are liable only for the harm inflicted "by reason of" the racketeering activity, 18 U.S.C. § 1964(c); RICO does not afford compensation for injuries caused by other conduct or other persons. *Sedima*, 473 U.S. at 496-97, 105 S.Ct. at 3285; *see Brandenburg v. Seidel*, 859 F.2d 1179, 1187 (4th Cir.1988) (plaintiff must adequately plead causal nexus between harm and racketeering activity). Thus, although Barrington Hall may have been noisy, thrown wild parties and otherwise been less than an ideal neighbor, RICO does not afford plaintiffs a remedy for those wrongs. It provides compensation only for injuries caused by the racketeering conduct.

B. The complaint alleges that residents of Barrington Hall conducted drug sales and posted look-outs in front of plaintiffs' apartments and in their carports. This, they contend, interfered with the use and enjoyment of their property by making them fear for their safety and by making it appear that their apartments were a source of drugs. Third Amended Complaint ¶ 55, ER 15- 16. In addition, they claim that Barrington Hall's residents regularly disposed of overdose victims by dumping them in front of the building instead of summoning emergency assistance, all in an effort to conceal their nefarious activities. *Id.* ¶ 15, ER 4.

Plaintiffs' pleadings are no model, but this much is clear: the racketeering conduct complained of was the direct cause of the alleged injuries. According to the complaint, the racketeers themselves interfered with plaintiffs' use and enjoyment by distributing narcotics on and around plaintiffs' property. Furthermore, plaintiffs alleged that overdose

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[6]Apparently plaintiffs were unable to come up with any injuries or crimes that begin with the letters w, x, y and z.

victims languished about the neighborhood because the racketeers were trying to conceal their illegal conduct. The injury was thus the direct consequence of the racketeering activity; there were no intervening causes or actors, and the harm was strictly foreseeable. The blighting of a neighborhood by the fallout from a racketeering enterprise seems to be the type of harm well within the contemplation of the statutory drafters. Causation was adequately pleaded.

[9] C. The same cannot be said of plaintiffs' other allegations. Without doubt, plaintiffs found it unpleasant to live amidst "filth, risk of disease, and noise." Third Amended Complaint ¶ 56, ER 16. We also agree that they should not have had to tolerate "violence, [the] throwing of garbage on [their] property, [people] urinating on cars parked at [their property], vandalism," *id.*, and burglary, *id.* ¶ 54, ER 15. But RICO doesn't provide a remedy for unneighborly conduct; it provides compensation only for damages caused by racketeering activity.

Plaintiffs have failed to allege sufficient facts to demonstrate that these problems were caused by Barrington's narcotics activity. First of all, the complaint never explains who committed the alleged wrongs. Of course, the culprits might have been customers of the racketeering enterprise, or even the racketeers themselves; but plaintiffs don't say so. Based on the complaint, it's just as likely that the perpetrators were totally unconnected to Barrington Hall or its racketeering. Certainly, defendants are not liable under RICO for every misdeed ever committed in the neighborhood. In fact, defendants aren't even liable under RICO for the conduct of their social visitors--unless their bad acts can somehow be connected to the racketeering.

Furthermore, the complaint fails to allege *how* Barrington Hall's racketeering activity caused the culprits--whoever they were--to commit the listed offenses. It's certainly possible that Barrington's racketeering drew the perpetrators to the area and encouraged them to commit the offenses; but plaintiffs

made no such allegation. Accordingly, the district court did not err in dismissing those portions of the complaint that allege harms but fail to link them to the racketeering activity.[7]

Conclusion

We reverse in part, affirm in part, and remand for further proceedings.

RYMER, Circuit Judge, dissenting:

I have no quarrel with the notion that these aggrieved plaintiffs may have some state law cause of action against "the last rampart" of sixties counterculture. I dissent because I am convinced that their inability to allege *financial* harm sinks their civil RICO claim.

The majority correctly concludes that RICO's requirement of an injury to "business *or* property" does not require a plaintiff to plead injury to "business property." Nevertheless, invocation of the talismanic phrase "property interest" does not suffice to satisfy the statute's requirement of injury to property. In this circuit, we require civil RICO plaintiffs to allege that they have suffered a "financial loss or injury." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990); *First Pac. Bancorp, Inc. v. Bro*, 847 F.2d 542, 547 & n. 12 (9th

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[7]Plaintiffs also claim that discarded hypodermic needles posed a threat to their safety and interfered with their use and enjoyment. Third Amended Complaint ¶ 56, ER 16. One could easily infer that the needles were provided by Barrington Hall or were used to inject drugs purchased at Barrington Hall; an allegation to that effect would have sufficiently stated the causal nexus between the racketeering activity and the harm. But plaintiffs made no such allegation and declined to amend the complaint. We defer to the district court's sound discretion on remand as to whether the inference of causation should be drawn from plaintiffs' pleadings or whether plaintiffs should be given an opportunity to amend their complaint in light of our opinion.

Cir.1988). The proper focus is on the nature of the *loss* these plaintiffs have suffered, not on whether a "property right" exists. Even assuming that these plaintiffs have suffered some harm to a property interest, I fail to see how they have contended that that harm is *financial* in nature. Their complaint, therefore, cannot survive a motion to dismiss. *Cf.* Berg, 915 F.2d at 464 & n. 4 (civil RICO action by plaintiff who had "property interest" in insurance policy could not survive summary judgment because harm from cancellation of policy was not "financial").

The majority reasons that defendants allegedly infringed upon plaintiffs' right to quiet enjoyment of their leasehold--one of the "bundle of sticks" making up their property right. Not according to California law, they didn't. A tenant's right to quiet enjoyment is a warranty by a lessor against her own acts, not against those of strangers. *Marchese v. Standard Realty and Dev. Co.*, 74 Cal.App.3d 142, 148, 141 Cal.Rptr. 370, 374 (1977) (citing *Carty v. Blauth*, 169 Cal. 713, 717, 147 P. 949 (1915); *Lost Key Mines, Inc. v. Hamilton*, 109 Cal.App.2d 569, 573, 241 P.2d 273 (1952)). Thus, disturbance by a neighbor cannot support a lessee's claim of impairment of his right to quietly enjoy his lease.

Plaintiffs' claims sound, if anywhere, in nuisance.[1] Assuming the alleged nuisance here could be characterized as private,[2] it is true that " 'any interest sufficient to be

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[1]Generally, under California law, the definition of a nuisance includes "[a]nything which is ... offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property...." Cal.Civ.Code § 3479 (West 1970).

[2]That assumption is not at all clearly warranted. The ills of which plaintiffs complain sound more like a public nuisance, which is defined by California law as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal.Civ.Code s 3480 (West 1970). All other nuisances are

(continued...)

dignified as a property right' " will support the action, including "a tenancy for a term." *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 125, 99 Cal.Rptr. 350, 356 (1971) (quoting Prosser on Torts 613-14 (3d ed.)). I agree that these plaintiffs' property interest is sufficient to confer standing to bring a state law nuisance suit. *See Stoiber v. Honeychuck*, 101 Cal.App.3d 903, 920, 162 Cal.Rptr. 194, 202 (1980) ("tenancy is a sufficient proprietary interest to give [plaintiff] *standing* to bring an action based on nuisance." (emphasis added)). For purposes of this case, though, the proper focus is not on the nature of plaintiffs' property rights to determine standing but on the nature of the *damage* they suffered.

In general, there are two types of damages a plaintiff may recover for nuisance: (1) loss of value of property and (2) loss of use and enjoyment of property. 9 H. Miller & M. Starr, Current Law of California Real Estate §§ 29:14-15 (2d ed. 1990). The existence of a "property interest" does not automatically entitle a plaintiff to both types of damages. Rather, a plaintiff's measure of damages in a nuisance action is "only an amount sufficient to compensate him for his actual detriment." *Coats v. Atchison*, T. & S.F. Ry., 1 Cal.App. 441, 444, 82 P. 640 (1905); *see also* Cal.Civ.Code § 3333 (West 1970) (measure of damages is "detriment proximately caused" by defendants' action). We must therefore examine the nature of plaintiffs' "actual detriment."

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[2](...continued)
considered "private." Cal.Civ.Code s 3481 (West 1970). *See Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 123-26, 99 Cal.Rptr. 350, 355-57 (1971) (distinguishing private actions based upon public nuisances, which require an injury different in *kind* from the injuries suffered by the general public, from private nuisances). Plaintiffs in this case have not alleged that their injuries are any different in kind from other residents of their neighborhood.

When a nuisance is continuing, rather than permanent,[3] the usual measure of the first category of damages (loss of value of property) that an owner of property may assert is loss of rental value. *Guttinger v. Calaveras Cement Co.*, 105 Cal.App.2d 382, 387, 233 P.2d 914, 917 (1951); *Ingram v. City of Gridley*, 100 Cal.App.2d 815, 820, 224 P.2d 798, 801 (1950) (citation omitted).[4] That type of loss would qualify as financial. In this case, though, plaintiffs have not sustained that type of injury because they have not alleged that they are even legally capable of renting their property interests to others, much less rent them for higher prices than they were paying their lessors.[5] The rental value to plaintiffs, therefore, is zero and cannot be diminished any further. Plaintiffs in this case differ from other plaintiffs in California cases who were capable of renting their interests and therefore could claim actual, financial injury from a nuisance diminishing that rental value. *See, e.g., Qualls v. Smyth*, 148 Cal.App.2d 635, 637-38, 307 P.2d 29, 30 (1957) (measure of owner's "value of property" damage from periodic "turkey dust" that wafted over from neighboring farm "was the depreciation of the rental or use value of the property"); *Spaulding v. Cameron*, 127 Cal.App.2d 698, 706, 274 P.2d 177, 182 (1954) (owner who lived in premises during period of nuisance received damag-

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[3]A nuisance that will presumably continue indefinitely is considered permanent; one that may be discontinued at any time is continuing. *Phillips v. City of Pasadena*, 27 Cal.2d 104, 107, 162 P.2d 625, 626 (1945). Because the alleged nuisance in this case has stopped, obviously it was continuing rather than permanent while it lasted.

[4]Rental value is different from market value, which is the measure of damages when the nuisance is of a permanent character. *Ingram*, 100 Cal.App.2d at 820, 224 P.2d at 801 (citation omitted).

[5]They allege only that "[a] reasonable person would have a reduced desire to rent plaintiffs' apartments" in general, not that the plaintiffs themselves were actually legally capable of renting. Indeed, given that the apartments were rent-controlled, the plaintiffs likely could not sublease them.

es for loss of rental value); *Guttinger*, 105 Cal.App.2d at 387, 233 P.2d at 917; *Ingram*, 100 Cal.App.2d at 820, 224 P.2d at 801.

There are other types of loss of value of property that are financial in nature and would therefore arguably be cognizable under RICO, for example, "actual injuries to the land" and "costs of minimizing future damages." *City of San Jose v. Superior Court*, 12 Cal.3d 447, 464, 525 P.2d 701, 712, 115 Cal.Rptr. 797, 808 (1974) (citations omitted). Another example would be a tenant who loses rental money because a nuisance forces abandonment of the premises with time still left on a lease for a given term (and therefore money still owed to the lessor). *See Kishlar v. Southern Pac. R.R.*, 134 Cal. 636, 66 P. 848 (1901) (recovery for lost value when nuisance compelled lessee to vacate before the lease ended and building stood idle for over nine months). Plaintiffs in this case have alleged none of these other types of financial loss. They are not out one cent from defendants' alleged acts, either in foregone opportunity or money owed or damage needing repair. In short, they have alleged no financial loss at all.[6]

Instead, plaintiffs' allegations implicate the second type of nuisance injury: loss of use and enjoyment. That is a perfectly proper thing to allege in a nuisance action, and there need not be actual loss of value in order to sustain a nuisance claim for annoyance, inconvenience, discomfort, mental distress or the like. *See City of San Jose*, 12 Cal.3d at 464, 525

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[6]The majority reasons that plaintiffs' loss is "economic" because their leases are "worth less." *Ante* at 812. They may be "worth less" in a lay understanding, but the characterization is legally immaterial. The leases have no quantifiable "worth" to the plaintiffs to begin with, so the leases' legal value to them has not been diminished, at least given the absence of an alleged capability to earn something from the property. The majority dignifies potential recovery for an abstract loss–a diminished "market value" in general–even though as to *these* plaintiffs, who are incapable of marketing the property at all, it has no legal rental value. There is no such thing as market value "in the air," as it were.

P.2d at 712, 115 Cal.Rptr. at 808; *Acadia, Cal., Ltd. v. Herbert*, 54 Cal.2d 328, 337, 353 P.2d 294, 299, 5 Cal.Rptr. 686, 691 (1960); *Smith v. County of Los Angeles*, 214 Cal.App.3d 266, 287-88, 262 Cal.Rptr. 754, 766 (1989); *Qualls*, 148 Cal.App.2d at 637-38, 307 P.2d at 30; *Spaulding*, 127 Cal.App.2d at 706, 274 P.2d at 182; *Alonso v. Hills*, 95 Cal.App.2d 778, 788, 214 P.2d 50, 57 (1950). Yet even if such damage is labeled an "injur[y] to real property," *City of San Jose*, 12 Cal.3d at 464, 525 P.2d at 712, 115 Cal.Rptr. at 808, it is not a financial loss. "Personal discomfort and annoyance to which a person has been subjected by a nuisance on adjoining property," which describes this second type of nuisance damage, "is like that claimed by the plaintiff in a personal injury action." *Ingram*, 100 Cal.App.2d at 823, 224 P.2d at 803. It is settled that personal injuries are not financial losses compensable under RICO. *Berg*, 915 F.2d at 464.

If defendants diminished plaintiffs' enjoyment of their property, then plaintiffs may sue to their hearts' content--in state court, alleging nuisance. But in my view, this complaint was in the wrong court under the wrong statute and the district court properly dismissed it.[7]

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[7]The district court need not have given plaintiffs leave to amend because this complaint was already their fourth try. Because I believe the complaint did not state a RICO cause of action, I would not reach the causation issue.

APPENDIX C

Opinion of the United States Court of Appeals Ninth Circuit

Ruth E. OSCAR; Charles Spinosa,
Plaintiffs-Appellants,

v.

UNIVERSITY STUDENTS CO-OPERATIVE ASSOCIATION, George Proper, et al.,
Defendants-Appellees.

No. 90-15750.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted En Banc Feb. 20, 1992.
Decided June 4, 1992.

Appeal from the United States District Court for the Northern District of California.

Before WALLACE, Chief Judge, and HUG, SCHROEDER, ALARCON, POOLE, D.W. NELSON, BRUNETTI, NOONAN, THOMPSON, RYMER, and KLEINFELD, Circuit Judges.

D.W. NELSON, Circuit Judge:

Plaintiffs Ruth Oscar and Charles Spinosa (collectively Oscar) rented apartments in Berkeley near Barrington Hall, a student co-operative run by defendant University Students Co-Operative Association (USCA). Angered by a wide range of unneighborly behavior on the part of Barrington residents, including drug dealing, Oscar sued USCA and all the residents of Barrington Hall. Oscar claimed that the activities of Barrington residents collectively violated the Racketeer Influenced and Corrupt Organizations Act (RICO), and sought treble damages under 18 U.S.C. § 1964(c). The district

court dismissed the complaint for failure to state a claim. A three judge panel of this court reversed, *Oscar v. University Students Co-operative Ass'n*, 939 F.2d 808 (9th Cir.1991), and we agreed to rehear the case en banc. *Oscar v. University Students Co-operative Ass'n*, 952 F.2d 1566 (9th Cir. Jan 10, 1992). We affirm the district court's dismissal of the complaint.

I.

According to the factual allegations of plaintiffs' complaint, Barrington Hall residents collectively agreed at a house meeting to allow drug dealing at Barrington. At least nineteen different individuals within the co-operative sold drugs there, and drug sales have allegedly been going on at Barrington for over twenty years. In furtherance of this agreement, according to the complaint, defendants posted lookouts on neighboring property, and dumped the bodies of persons suffering from drug overdoses on their neighbors' land. The conspiracy was also responsible, we are told, for "filth, risk of disease, and noise"; for "violence, throwing of garbage on property, urinating on cars [and] vandalism"; and for numerous other crimes, misdemeanors, nuisances, and annoyances.

The plaintiffs rent apartments in large apartment buildings near Barrington. Barrington is located in the city of Berkeley, California, which has one of the strictest rent control ordinances in the nation. The plaintiffs began renting there in the mid-1980's. Since the complaint was first filed, one of the plaintiffs has moved out; the other remains. The plaintiffs allege that they have lost the use and enjoyment of their "property"--that is, their rental interest--as a result of the activities at Barrington.

After allowing Oscar three opportunities to amend her complaint, the district court dismissed it on the grounds that Oscar could not demonstrate a causal connection between a pattern of racketeering activity and injury to Oscar. We

affirm the dismissal of Oscar's complaint on the ground that Oscar has not alleged an injury to business or property cognizable under RICO.

II.

Dismissal of a complaint under Fed.R.Civ.P. 12(b)(6) is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 110 S.Ct. 3217 (1990). In reviewing a 12(b)(6) dismissal, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989). The decision of the district court may be affirmed on any ground finding support in the record. *Myers v. United States Parole Comm'n*, 813 F.2d 957, 959 (9th Cir.1987).

III.

[1] 18 U.S.C. § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of" RICO may recover treble damages and attorney's fees. While RICO is to be "liberally construed," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985), it is well-established that not all injuries are compensable under this section. Two limitations are significant in this case. First, a showing of "injury" requires proof of concrete financial loss, and not mere "injury to a valuable intangible property interest." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990) (citing *First Pacific Bancorp v. Bro*, 847 F.2d 542, 547 & n.12 (9th Cir.1988)); *see also Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir.1989) (plaintiffs under section 1964(c) entitled to recover only for money they paid out as a result of racketeering activity), *cert. denied*, 493 U.S. 1074 and 494 U.S. 1027 (1990).

In *Berg*, we held that directors of the Getty Oil Company could not maintain an action under RICO against the insurers who had cancelled their liability policies because the directors had incurred no actual expenses as a result of the cancellation. 915 F.2d at 463-64. This was true even though the

directors alleged that they had lost "both the protection ... afforded against potential financial loss in the future and the present peace of mind that flows from such protection," interests which we characterized as "valuable intangible property interest[s]." *Id.* at 464. The lesson of *Berg* is that injuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff.[1]

[2] Second, it is clear that personal injuries are not compensable under RICO. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (dictum); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3rd Cir.1991) (plaintiffs could not recover medical expenses and emotional distress resulting from their exposure to toxic waste); *Berg*, 915 F.2d at 464 (loss of security and peace of mind due to cancellation of insurance policy were not actionable under RICO); *Rylewicz v. Beaton Services*, 888 F.2d 1175, 1180 (7th Cir.1989) (harassment and intimidation of litigants in an attempt to get them to settle lawsuit could not support RICO claim); *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir.) (family of murder victim could not recover under RICO for economic consequences of murder), *cert. denied*, 488 U.S. 981 (1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (damages for physical injury and wrongful death resulting from exposure

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[1]The dissent attempts to distinguish *Berg* and the other cases establishing the financial loss requirement by suggesting that *Berg* could have reached the result it did without requiring financial loss. That is beside the point. *Berg* unambiguously held that "by 'actual injury,' we meant financial loss ..." 915 F.2d at 464. The dissent cannot point to a single case rejecting the financial loss requirement, or even a case allowing recovery for nonfinancial losses under RICO.

The dissent also makes much of the fact that *Berg* was a summary judgment case, while this case arises on a motion to dismiss. That distinction is not relevant in this case. *Berg* stated a proposition of law: injury under RICO requires proof of financial loss. We affirm the dismissal of Oscar's claim not because she failed to prove financial loss, but because she failed after four attempts to allege any facts which *could* show financial loss.

to toxic waste were not recoverable under RICO).

[3] These limitations are consistent with the intent of Congress in enacting RICO. As the *Genty* court explained:

> Congress' apparent unwillingness to allow recovery for personal injuries under RICO appears to be consistent with enacting RICO and its specific intention to thwart the organized criminal invasion and acquisition of legitimate business enterprises and property. Ample law already existed to provide recovery for wrongfully inflicted personal injuries. The unavailability of a civil RICO treble damages action for personal injuries in no way restricts the plaintiff's right to bring a pendent state wrongful death or personal injury action along with a RICO action for damages to business and property. We discern no injustice in limiting a RICO plaintiff's recovery for his personal injuries to ordinary non-RICO legal measures.
>
> We thus refuse to enlarge Congress' specific limitation of RICO recovery to business and property. The significance of section 1964(c)'s plain language is clear: RICO plaintiffs may recover damages for harm to business and property only, not physical and emotional injuries due to harmful exposure to toxic waste.

937 F.2d at 918-19. We agree. RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff. Requiring that a plaintiff demonstrate a financial loss to her business or property is consistent with that purpose. It is also consistent with what the Supreme Court has termed the "restrictive significance" of the phrase "injured in his business or property." *Reiter*, 442 U.S. at 339. With these limitations on compensable injury in mind, we turn to the allegations of Oscar's complaint.

IV.

[4] Oscar has not alleged any financial loss which would

be compensable under RICO. She has not alleged any out-of-pocket expenditures as a direct or indirect result of the racketeering activity at Barrington, for example costs incurred to repair damage to her personal property or even to purchase a security system. The only injury she has alleged is a "decrease in the value of her property" due to the racketeering activity next door. We do not believe that such a decrease entails financial loss to Oscar.[2]

Oscar rents an apartment in the city of Berkeley. She does not own the property on which she lives; her property interest in the land is a leasehold interest.[3] Although one might measure an owner's loss by the diminution in fair market value, the same cannot be said for a renter. If the resale value of the property goes down, Oscar has lost nothing. Indeed, if the value of the property drops far enough, Oscar's rent should go down. She would incur a financial *gain*, not a loss.

As a renter, Oscar could suffer financial loss in this situation only if she had an interest she could sublet and the racketeering enterprise reduced the rent she could charge to sublet her apartment. Before this court, Oscar claims to have suffered just such an injury. We reject this argument for several reasons. First, Oscar's complaint does not even allege that she has a right to sublet her apartment. Second, even if Oscar has the right to do so, she has not alleged that she ever sublet the apartment, that she ever attempted to sublet the

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[2]In reaching this conclusion, we deal only with the issue of financial injury, not proximate cause. We do not consider what, if any, types of claims by neighboring property owners might survive the proximate causation requirements of RICO. *See Holmes v. Securities Investor Protection Corp.*, 60 U.S.L.W. 4225 (U.S. Mar. 24, 1992).

[3]We are somewhat puzzled by the dissent's extended discussion of Oscar's property rights. We nowhere suggest that Oscar does not have a property interest in her apartment. We merely conclude that she has not shown "injury" to that property within the meaning of section 1964(c).

apartment, or even that she ever wished or intended to sublet the apartment. Any supposed loss is therefore purely speculative. Finally, the Berkeley rent control law prevents Oscar from charging a sublessor rent in excess of the rent-controlled price of the apartment. To show injury, therefore, Oscar would have to allege that the racketeering activity caused the market value of her apartment to decline below the (artificially low) rent control price, and that she could not simply move out if that happened.

Oscar has had four chances to make such allegations. She has not done so. To remand her complaint for trial on the off chance that she could make such a showing in the future would be to allow her to rely on precisely the sort of speculative future injury which RICO disdains. *See Hecht v. Commerce Clearing House*, 897 F.2d 21, 24 (2nd Cir.1990).

[5] Oscar also claims that she has lost the "use and enjoyment" of her leasehold interest; she values her apartment less than she otherwise would because there are drug dealers living next door.[4] No doubt this is true. This diminution in enjoyment is not a tangible injury to property, however. Whether or not Oscar herself enjoys her apartment less, the bottom line is that the *market* value of Oscar's leasehold interest has not declined.

[6, 7] What Oscar is really complaining about is the "personal discomfort and annoyance to which [she] has been subjected by a nuisance on adjoining property." *Ingram v. City of Gridley*, 224 P.2d 798, 803 (Cal.Ct.App.1950). We agree with the dissent--this is a perfectly cognizable claim for nuisance

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[4]Oscar has "lost" the use and enjoyment of her property only in a very technical sense. She first moved into her apartment in the mid-1980's; according to her own allegations, Barrington was conducting drug deals in the neighborhood long before then. Oscar thus has not *lost* anything; what she really means is that she *has never had* as much use and enjoyment of her property as she believes she is entitled to. This is yet another step removed from financial loss.

under California law. The *injury* alleged, however, "is like that claimed by the plaintiff in a personal injury action." *Id.* As we have seen, personal injuries are not actionable under RICO. Oscar has no doubt lost "peace of mind" as a result of the activities at Barrington. *Berg*, 915 F.2d at 464. As we held in *Berg*, however, such a loss--even when it flows from a valuable property interest--is "a personal injury in the form of emotional distress, not a claim for an injury to property as section 1964(c) requires." 915 F.2d at 464.[5]

We do not intend to denigrate the severity of the problems Oscar has alleged or the harm inflicted on her. It is clear, however, that any injury she has suffered is at core an intangible personal injury, not a financial loss to property. Oscar can recover for such injuries under any one of a myriad of state law causes of action. She cannot do so under RICO, however.

As the Seventh Circuit said recently in rejecting a RICO claim for economic losses which derived from a fundamentally personal injury: "Perhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to 'business or property,' but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary." *Doe v. Roe*, No. 91-1289, 1992 U.S.App. LEXIS 3764, at 19-20 (7th Cir. March 9, 1992). The requirements for pleading an injury cognizable under RICO are quite clear. They are not met here.

AFFIRMED.

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[5]If Oscar's Maserati was smashed, or her house was burned down, she is injured in a variety of ways. However, if her insurance pays the full cost of replacing these items, she has suffered no *financial* loss. Oscar might be attached to her Maserati, and she almost certainly would not be indifferent to her house burning down, even though she could buy a new one. This intangible or sentimental value is compensable in a tort action, just as emotional distress is compensable. Neither is compensable under RICO, however.

KLEINFELD, Circuit Judge, with whom Circuit Judges HUG and BRUNETTI join, dissenting:

I respectfully dissent.

Congress and the President have promulgated a statute which enables people of moderate means to retain attorneys with the aid of a fee shifting provision, and recover treble damages, by suing narcotics dealers who reduce the quality of life in their neighborhood. This bounty, taken from the property of narcotics dealers, offers a benefit to induce citizens to act as private attorneys general, and offsets the burdens which might deter them from relying entirely upon the criminal justice system. Our narrow and novel construction of RICO damages vitiates the statutory scheme in an important application.

The panel's decision, *Oscar v. University Students Co-operative Association*, 939 F.2d 808 (9th Cir.1991), is correct, and its correctness is strengthened by the subsequent Supreme Court decision in *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992). Elucidation of the traditional concepts of property, injury to property, and damages, and application of those concepts to the kind of harms claimed in this case, requires that the lawsuit be permitted to proceed. Damages of the kind claimed by Oscar and Spinosa traditionally do not require tangible financial loss, though in some other RICO applications financial loss must be proved. The statute, interpreted according to the well established common law meanings of its terms, empowers people to hire attorneys at the expense of neighboring drug dealers whose narcotics dealing ruins the quality of life for nearby apartment dwellers and homeowners, and take away the criminals' money. The rescue of neighborhoods, by allying law abiding citizens' financial self-interest with their altruism, through the mechanism of treble damages lawsuits against racketeers, appears to have been just what Congress

intended. *Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985), taught us that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." Likewise, there is no room for an additional tangible financial loss requirement. Congress has not authorized us to erect this door and shut it on a kind of case most central to achieving the purposes of the statute.

Title 18 U.S.C. § 1964(c) provides that

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The statute does not say "injured in his ... property with consequential financial loss." It just says "injured in his ... property." Damages are required, but damages for injury to property are generally measured other than by realized financial loss. *Sedima* sets forth the elements of a RICO claim. The majority opinion incorrectly attributes a novel and narrow meaning to "injured" and "damages." In the case at bar, if the complaint is true, then Oscar and Spinosa were probably paying the same amount of rent money as they would have without the drug dealing, but the pattern of narcotics dealing reduced the value of their apartments, so they suffered damages measured by the reduction in value.

I. Facts

It is important that this appeal involves a dismissal under Rule 12(b)(6) rather than an adverse decision on summary judgment or at trial. We are required to assume the truth of the averments in the complaint for purposes of determining whether they state a claim upon which relief can be granted. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A dismissal for failure to state a claim is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support

of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). There is as yet no evidence before the court upon which any evaluation could be made of the truth of the alleged facts.

We must therefore assume that USCA intentionally aided, abetted and conspired in the sale of LSD, methamphetamine and heroin at Barrington Hall. We must assume that Oscar and Spinosa rented apartments in an adjacent building and that Oscar rented off-street parking. Unless it is beyond doubt that plaintiffs could prove no facts in support of this proposition, we must assume that, as the complaint avers, the racketeering activity "negatively affected the value of the plaintiffs' property interest in their apartments." The drug dealing, we must assume, generated fear in people entering Oscar's and Spinosa's building, caused risk of disease from discarded hypodermic needles, and caused filth, urination on tenants' cars, noise, and deposits of garbage, feces, vomit and the deposition of bodies of overdosed drug users on the common parts and parking areas of the building where Oscar and Spinosa lived. Assuming that these things are true, we must decide whether this claim is one upon which relief could be granted under RICO.

II. *Berg* and Other Authorities Cited

The majority opinion states two premises for its conclusion:

> First, a showing of "injury" requires proof of concrete financial loss, and not mere "injury to a valuable intangible property interest." ... The lesson of *Berg* is that injuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff.
>
> Second, it is clear that personal injuries are not compensable under RICO.

Maj. op. at 6157-58 (citations omitted). The second premise is

plainly correct, but does not lead to the conclusion reached by the majority, because the injury claimed is of a kind that the law has always considered injury to property, not injury to the person. The first premise is novel and unsupported by the authorities. Whether injury to a tenant's property interest in real estate without tangible pecuniary loss confers RICO standing appears to be a question of first impression. The authorities relied upon by the majority do not resolve the issue, and their reasoning cuts in favor of the plaintiffs.

Berg v. First State Ins., 915 F.2d 460 (9th Cir.1990), was a summary judgment case, not a Rule 12(b)(6) case. That matters, because the RICO claim in *Berg* had to be tested against evidence, not just allegations. The plaintiffs brought a RICO suit against their insurance companies for wrongful cancellation of their liability insurance policies. They suffered no monetary loss, because the insurance companies defended them despite the cancellation, and the lawsuits against them were settled in a way which cost them no money. We accepted the proposition that insurance policies are property, but we found no damages, because the directors had suffered no financial loss. We also determined that the interference with the directors' peace of mind while the lawsuit was pending was personal injury, not injury to property.

Berg is distinguishable, because the nature of the property was a contract right. The only damages from injury to that property would be on account of loss of performance of the contract. The directors were put in as good a position by the defense and settlement as they would have been by performance, so no damages of the type awarded for injury to contract rights could be proved.

Had the insurance policy been valuable as tangible property, say a handsome, ancient leather-bound parchment from Lloyd's with a wax and ribbon seal, and not just as a contract right, then injury to the property would have been more analogous to Oscar's and Spinosa's claimed injuries. The analogy would exist because the damages for injury to

property are generally the reduction in value of the property. Contract damages like those at issue in *Berg* are generally designed to put the victim in as good a position as he would have enjoyed had the contract been performed. For tortious injury to an interest in land, the usual measure of damages is the reduction in value caused by the harm, loss of use, and discomfort and annoyance to the occupant. Restatement (Second) of Torts § 929(1) (1977). The proposition that injury to property requires financial loss is one thing where the property, as in *Berg*, is in the nature of a promise to protect the owner against financial loss, and quite another where the property is real estate damaged by a tort.

Berg stands only for the propositions that damages are an element of a RICO claim, and that the damages must be for injury to property. In the summary judgment context of that case, plaintiffs needed some cognizable evidence of damages resulting from the injury to their property rights in the insurance policies and did not have it. Only evidence of tangible financial loss would have sufficed in *Berg* because that was the only kind of cognizable damages which would have been possible for injury to the kind of property at stake.

First Pacific Bancorp v. Bro, 847 F.2d 542 (9th Cir.1988), also involved summary judgment rather than a motion to dismiss. We affirmed because "[a]bsent damages, the RICO claim can not be sustained," and the bank had "failed to make a showing of actual injury" and had "provided no evidence to support the inference that financial loss or injury was incurred as a result of the proxy solicitations or the proposed shareholder derivative suit." *Id.* at 547 & n. 12. The bank had claimed that a threatened proxy fight had caused deposits and loans to fall off, but presented no evidence to prove it. We specifically noted that the defendants had not obtained any money or property and no corporate action had resulted from the threatened proxy fight. *Id.* at 544. *Bro* does not apply a financial loss requirement to screen out a claim where there is injury to an interest in real estate in the nature

of reduction of value. Nor does it create a financial loss requirement. *Bro* just notes the absence of financial loss in a context where financial loss would be the only kind of damages possible.

Fleischauer v. Feltner, 879 F.2d 1290 (6th Cir.1989), *cert. denied*, 493 U.S. 1074 *and* 494 U.S. 1027 (1990), went to trial, so the court was not deciding what kinds of damages could be pleaded, but rather what kinds had been proved. *Fleischauer* denied expectancy damages, "[a]lthough in some cases expectancy damages might be appropriate," *id.* at 1300, because the proof did not support them in that case.

The majority opinion cites a number of other authorities for the correct proposition that personal injuries are not compensable under RICO, but I can find no case from any circuit standing for the proposition that realized tangible financial loss must be pleaded. Tangible financial loss must be proved where, if the plaintiff had any damages from the injury to plaintiff's property or business, the damages would be tangible financial loss. Where the category of harm is injury to the person, tangible financial loss cannot confer RICO standing; the explanations given for this proposition imply that where the category of harm is injury to property of a type measured by reduction of value, absence of tangible financial loss cannot take away RICO standing.

The majority concedes that the plaintiffs' interests in their apartments constitute property interests. Maj. op. at 6160 n. 3. This means that injury to those interests is injury to property. The majority concludes that although plaintiffs' interests are property, they have not pleaded injury. *Id.* The majority concedes that Oscar has pleaded a claim for nuisance. The step at which the majority and I take different paths is the next one. Under the majority view, because Oscar and Spinosa did not plead tangible financial loss, they have no damages. Under my view, loss of value will suffice as damages for nuisance, without tangible financial loss. We disagree on whether, under RICO, the resemblance of the

reasons for reduction of the value of land afflicted by nuisance to emotional distress in personal injury, converts nuisance from a claim for injury to property to a claim for injury to persons. I cannot accept the proposition that a loss of the benefits of property ownership, even if "it flows from a valuable property interest," maj. op. at 6161-62, is a personal injury claim in the absence of a market exchange producing financial loss. None of the cited cases speak to that point.

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) does not speak at all to this. Nor does *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir.1991). *Genty* was a RICO claim by home buyers against developers who fraudulently concealed a toxic dump which reduced the value of their home. The Third Circuit held that the reduction in value of the house was compensable under RICO, but that personal injuries, including medical expenses and mental distress caused by fear of cancer, were not. In the case at bar, plaintiffs alleged a "decrease in the value of their property caused by defendant's racketeering," so *Genty* supports them. Decrease in the value of their leasehold interest, whatever it may turn out to be, is injury to property, like the decrease in the value of the house in *Genty*.

Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir.1989), stands for the propositions, not at issue here, that RICO recovery is not available for personal injuries or for a shareholder's derivative claim. In *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir.), *cert. denied*, 488 U.S. 981 (1988), the victim of the RICO conduct was murdered; murder is personal injury, not injury to property, and pecuniary losses flowing from the wrongful death could not transform personal injury into injury to property. Just as the presence of pecuniary losses cannot make personal injury compensable under RICO in *Grogan*, I suggest that absence of realized pecuniary losses cannot eliminate the compensability under RICO of property injury flowing from racketeering activities, provided that there are damages. The issue is always

whether there are damages from injury to property; whether there is realized pecuniary loss matters only where that is the appropriate measure of damages. Similarly, *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986), was purely a personal injury claim, for sickness and death allegedly arising out of exposure to toxic chemicals at the workplace. As in *Grogan*, the existence of consequential pecuniary harm could not save the RICO claim, because it was for personal injury, not injury to property.

In the case at bar, as in *Berg* and *Bro*, plaintiffs may fail to develop cognizable evidence of damages in opposition to a summary judgment motion, or persuasive evidence of damages at trial. If they fail to produce the necessary evidence of damages from injury to property, their RICO claim would properly be dismissed because of the failure of proof. But at the present juncture, we are required to proceed on the supposition that plaintiffs could develop evidence of the damages, because they aver damages in their complaint.

III. Injury to Property

Oscar and Spinosa must allege injury to property and damages, because these are two elements of their RICO claim. The kind of injury to property alleged by the plaintiffs controls what kind of damages are material to their claim.

A. Commercial Loss Unnecessary

USCA argues that only losses of a commercial or business nature are recoverable under section 1964(c). Though the majority opinion does not adopt that proposition, there is value in showing why it is incorrect, because the reasoning of the cases rejecting it also compels rejection of the majority's requirement of realized financial loss.

In *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992), the Supreme Court incorporated the proximate causation element of the Clayton Act into section 1964(c). The Court observed that "Congress modeled § 1964(c) on the

civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," and that the federal courts had construed section 4 and its predecessor, section 7 of the Sherman Act, as incorporating common law principles of proximate causation. *Id.* at 1317. The *ratio decidendi* underlying the *Holmes* decision was that

> the 91st Congress, which enacted RICO, [knew] the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Id. at 1317-18 (citations omitted). Although *Holmes* involved the issue of proximate causation rather than injury to property, the reasoning employed by the Court compels us to use Clayton Act and Sherman Act cases to construe the words "injured in his ... property."

The leading Clayton Act case on injury to property is *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). The Court firmly rejected the possibility of any *noscitur a sociis* gloss on "property" within the meaning of the Clayton Act's section 4. *Reiter* teaches that anything of material value owned or possessed is "property," even though it is of no commercial significance:

> [T]he word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed.

Id. at 338. The Court rejected the contention that the adjacent reference to "business" modified the meaning of the term "property," stating that Congress' use of the disjunctive "or" indicated that the terms were to be given separate meanings. Thus, while the Court noted that personal injury would not fall within the purview of the statute, *id.* at 339, the term

"property" was given an unmistakably broad meaning.

After *Holmes* and *Reiter*, it cannot be disputed that injury to a noncommercial possessory interest in real estate is injury to property. The majority correctly concedes that Oscar and Spinosa's interests in their apartments, even if month-to--month and without a written long-term lease, are "property." *See also Jones v. Kelly*, 280 P. 942, 943 (Cal.1929); *Stoiber v. Honeychuck*, 162 Cal.Rptr. 194, 201- 02 (Cal.App.1980).

B. The Alleged Harm is Injury to Property

The majority reads into the phrase "injured in his ... property" a qualification that if the consequence of the injury to the property is personal discomfort and annoyance without tangible financial loss, the injury must be categorized as personal injury rather than injury to property. That construction cannot withstand established Clayton Act and Sherman Act authority.

We must look to the common law categories of injury to person and injury to property in order to determine which claims are for injury to property under RICO. *Holmes* establishes that the words and concepts are transitive between the Clayton Act, the Sherman Act, and section 1964(c) of RICO, so we must look to the Sherman Act and Clayton Act authorities. It is well established that "Congress intended the [Sherman] Act to be construed in the light of its common-law background." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) (holding that proximate causation in the common law sense was required under section 4 of the Clayton Act). *Holmes* delineated the parameters of the proximate causation element of section 1964(c) by reference to "the many shapes this concept took at common law." *Holmes*, 112 S.Ct. at 1318. The words copied into RICO from the Sherman Act and Clayton Act incorporate the ancient concepts lawyers have developed over the centuries in the common law. We must look to common law principles in determining whether the kinds of

injuries claimed by Oscar and Spinosa are categorized as injury to property or injury to person, in order to determine whether they were injured in their property within the meaning of section 1964(c).

The harm alleged by plaintiffs was to the value of their interests in their apartments. The creation of a tenancy in residential property does not merely establish a contractual relationship between the landlord and the tenant. A tenancy, whether periodic or for a definite term, conveys to the tenant a possessory interest in the property which is characterized as an estate in land. *Jones v. Kelly*, 280 P. 942, 943 (Cal.1929); Restatement of Property §§ 19-20 (1936). Although a leasehold is founded in an agreement between landlord and tenant, it is not merely a contract right, as in *Berg*, but also "an estate in land in the strictest sense." Roger A. Cunningham, et al., *The Law of Property* §§ 6.11, 6.13 (1984). The tenant has a right to sue directly third persons who trespass on the tenant's possession "or whose conduct constitutes a nuisance, decreasing the lessee's enjoyment of his term." Richard R. Powell & Patrick J. Rohan, *Powell on Real Property* § 225(4) (1968); *Stoiber v. Honeychuck*, 162 Cal.Rptr. 194, 201-02 (Cal.App.1980).

The connection between the tort of nuisance and the enjoyment and peace of mind of the possessor of land does not make plaintiffs' claim one for personal injury, as the majority opinion suggests. The word "enjoyment" is just the ancient common law term of art describing one of the tenant's property rights inhering in the nature of his estate. "The essence of a private nuisance is an interference with the use and enjoyment of land." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 87, at 619 (5th ed. 1984). Though the description of the interest harmed as "use and enjoyment" might seem to imply that disturbance of the interest would be an injury to the person, "the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke." *Gardiner v. William S.*

Butler & Co., 245 U.S. 603, 605 (1918) (Holmes, J.). "The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." Keeton, *supra*, § 87, at 619.

We are seven centuries too late to characterize nuisance as injury to person rather than to property. The complaint alleges facts sufficient to support a claim that the defendant's racketeering activity interfered with the plaintiffs' right to the use and enjoyment of their apartments. At common law, an allegation that the defendant has invaded the plaintiff's interest in the use and enjoyment of property sounds in tort and states a claim for nuisance. This tort arose in the thirteenth century to vindicate "interferences with servitudes or other rights to the free use of land." Keeton, *supra*, § 86, at 617. Blackstone described nuisance as a injury to property, and so it has always been: "A third species of real injuries to a man's lands and tenements is by nuisance." J.W. Ehrlich, *Ehrlich's Blackstone* 581 (1959). Blackstone says the ancient writ for damages for nuisance was available to lessees as well as to holders of the fee. *Id.* at 584. Since this right is "inseparable from ownership of the property," conduct that interferes with the "right to the undisturbed enjoyment of the premises" constitutes injury to property within the meaning of section 1964(c). Keeton, *supra*, § 87, at 619.

The classification of nuisance as injury to real estate is not a mere historical anomaly to be filtered out of the common law on the way to RICO. Though the consequences of nuisance may be annoyance to persons rather than physical harm to land, the persons are harmed only because of their connection to the land.

> Thus, many interferences with personal comfort, such as a dog next door which makes night hideous with his howls, which at first glance would appear to be wrongs purely personal to the landholder, are treated as nuisances because they interfere with that right to the

> undisturbed enjoyment of the premises which is inseparable from ownership of the property.

Id.

Oscar and Spinosa do not suggest that the narcotics dealers bore them any special animus, just that the drug dealing adversely affected the nearby apartments in which they had the misfortune to live. The harm would be imposed on anyone who had the connection to the real estate that they did, and it would not have been imposed on Oscar and Spinosa but for their connection to the land. The majority opinion concedes that plaintiffs state a claim for nuisance.

The majority cites *Ingram v. City of Gridley*, 224 P.2d 798 (Cal.App.1950), for the proposition that plaintiffs' claims are " 'for personal discomfort and annoyance.' " Maj. op. at 6161 (quoting *Ingram*, 224 P.2d at 803). The majority infers that we must classify the claims as personal injury rather than injury to property, because the injury " 'is like that claimed by the plaintiff in a personal injury action.' " *Id.* However, *Ingram* explicitly classifies the tort of nuisance in California as "injury to real property." *Ingram*, 224 P.2d at 801. The nuisance at issue in *Ingram* was discharge of sewage into a slough flowing through the plaintiffs' dairy. The court stated that the measure of damages is "usually held to be the depreciation in the market or usable or rental value of the property, together with such special damages as may be proved." *Id.* *Ingram* says that the damages for "annoyance, discomfort, and inconvenience caused by a nuisance [and] deprivation of the comfortable enjoyment of the property," *id.* at 802, are "*like* that claimed by the plaintiff in a personal injury action," *id.* at 803 (emphasis added), not that that they *are* damages for personal injury. The point of the comparison was to explain why the evidence of such intangible and nonpecuniary damages as impairment of the flavor of the milk produced and the fact that "guests ... would remain away rather than suffer the noisome stench," *id.* at 802, was sufficient to prove damages, even without expert testimony or pecuniary

loss.

IV. Damages

Once the injury is classified as nuisance, which is an injury to real property, the measure of damages for that tort compels a determination that the complaint states a claim.

A. Financial Loss

The majority slides off the path because of a conceptual error relating to the valuation of damages in rental property.

> Although one might measure an owner's loss by the diminution in fair market value, the same cannot be said for a renter. If the resale value of the property goes down, Oscar has lost nothing. Indeed, if the value of the property drops far enough, Oscar's rent should go down. She would incur a financial gain, not a loss.
>
> As a renter, Oscar could suffer financial loss in this situation only if she had an interest she could sublet and the racketeering enterprise reduced the rent she could charge to sublet her apartment.... To show injury, therefore, Oscar would have to allege that the racketeering activity caused the market value of her apartment to decline below the (artificially low) rent control price, and that she could not simply move out if that happened. Maj. op. at 6160.

The plaintiffs' property is not held, like negotiable instruments, merely for the purpose of exchange. People rent apartments in order to live in them. If the value of an interest in real or tangible personal property is reduced by a tort, then the owner of the interest, whether it is a chattel real such as the plaintiffs own, an automobile damaged in a collision, or a house burned down, has damages for injury to property, whether they exchange the damaged property for money or not. Although they might have more money left in their pockets if the value was so impaired that their rent declined, Oscar and Spinosa would have injury to the value

of their possessory rights in their apartments.

Oscar and Spinosa need not allege that they intended to sublet their premises or that they have suffered any out-of-pocket loss, because realization of tangible financial loss through a market exchange is not required to establish damages for injury to real property. The measure of damages in a California private nuisance case is "diminution of the property's value and for annoyance and discomfort flowing from loss of use." *Moylan v. Dykes,* 226 Cal.Rptr. 673, 680 (Cal.App.1986). In *Moylan,* the evidence established that during the time plaintiffs could not use their property and a planned sale fell through because of the interference, the property appreciated, so they had no tangible pecuniary loss. Yet the court held that "even if intangible, the damages are no less real," *id.*, and upheld an award apparently based on a daily fair rental value. To measure injury to property, we must look at what happened to the value of the property, not what happened to the pecuniary condition of the owner, except insofar as that may bear on the truth of what happened to the value of the property.

Taking the majority's hypothetical cases at footnote 5, suppose a person's car is wrecked, or his house burned down, but insurance pays the full cost. The majority perceives no injury to property because the owner has suffered no net financial loss. It is more accurate, in my view, to say that the property has been injured, and treat the financial consequences to the insured owner as relevant to whether an insurer might be subrogated to part of the RICO recovery. While realization of pecuniary loss is sometimes required for tax deductions, it is generally not required for recovery of damages for injury to real property.

> [An injured plaintiff] is not required to prove that he sold his damaged automobile at a loss, for example, or that it was any less useful to him after the damage. A plaintiff whose land is used by a trespasser is entitled to recover general damages, probably rental value of

> the land. This is true even though he would not have leased the land to anyone and is in no way worse off because of the trespass.

Dan B. Dobbs, *Handbook on the Law of Remedies* 140 (1973). The majority's requirement of tangible financial loss as a consequence of the injury is analogous to the argument that a person is not damaged by the conversion of his umbrella because it did not rain. If what he owned was not an umbrella, but rather a promise by someone that he should remain dry, then the majority's requirement of tangible loss would be correct, and he would have no damages if it did not rain. That would be like *Berg*, where the directors owned a promise that they would be defended and would not suffer financial loss in lawsuits. But if a person owns an umbrella, the physical thing itself, then he is entitled to keep it, and he has damages from injury to his property if a tortfeasor damages or steals it. Suppose a merchant's windows are smashed by hoodlums because he refuses to pay protection money. He has damages from injury to property when the glass breaks, even though he may not have pecuniary loss until he scrapes together enough money to pay a glazier to replace it.

The majority cites *Doe v. Roe*, No. 91-1289 (7th Cir.Mar. 9, 1992), which holds that no RICO claim lies for fraudulent inducement of "sexual services" and consequential miscellaneous expenses. The case holds that where the financial losses are "derivatives of [the plaintiff's] emotional distress," they cannot convert a personal injury claim into a property damage claim. Slip op. at 12. "[W]hether she can show a financial loss does not, by definition, establish that she has suffered a business or property injury within the meaning of § 1964(c)." *Id.* This holding establishes the irrelevance of financial loss for categorizing the injury as one to person or property, not that financial loss is a required element.

B. Rent Control

Although the majority professes to abjure "metaphysical speculation," I think it implicitly engages in just such speculation regarding the effect of rent control. The majority suggests that since Oscar has not alleged either a right or a desire to sublet, and loses no money if her apartment becomes less desirable, she loses nothing. This is chock full of metaphysics. The implicit philosophical presupposition is that value exists only insofar as the market recognizes it in transactions. It does not occur to the majority to articulate this proposition, because its truth is so generally accepted that we rarely think about it. But it is true only upon the condition of a free market. Without a free market, price does not measure value, so we cannot assume that changes in value will be reflected in changes in price. If price is set by government command rather than by free exchange, then it is bad evidence of value. Value is generated by human desire, so declines as the thing at issue becomes less desirable. "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator." *International Harvester Co. v. Kentucky*, 234 U.S. 216, 222 (1914) (Holmes, J.).

Suppose an apartment, were it freely marketable, would be worth $800 per month, but the ceiling price of the unit under a regime of rent control is $440 per month. Since the landlord cannot raise the rent to reflect appreciation in the market value of the right to occupy the premises, and the price at which he can sell the underlying fee is depressed by the reduction in the stream of income which can be drawn from the apartments, typically he will skimp on maintenance to preserve net operating income. Peter Navarro, *Rent Control in Cambridge, Mass.*, The Public Interest, Winter 1985, at 83, 92. If the value of the fee is further reduced by crime in the neighborhood, then the resale value which the landlord preserves by continuing maintenance is also further reduced, so the point at which additional maintenance becomes uneconomic declines and the tenant can expect further deterioration of maintenance.

The consequences to the property of the criminal activity next door will also make it harder for the tenant to attract a roommate who might share the rent burden. The tenant's freedom will be circumscribed if she cannot attract friends over for dinner (as in *Ingram*, the stinking sewage in the slough case), or if she cannot walk to a convenience store in the evening or let her children walk to school, for fear of tripping over overdose victims or stepping on needles in the common parts and parking spaces.

No sensible person would value an apartment as highly if maintenance of the common parts deteriorated, roommates were hard to attract, friends were scared to come over, and the residents were scared to live their lives freely. An apartment for which $800 would have been exchanged on a free market were it not for the narcotics activity next door, and which was obtained under rent control for $440, might now have a free market value of only $500 because of the continuing criminal activity next door. The tenant owns a property right which would be worth $800 a month without the next door neighbor's narcotics dealership, but only $500 a month so long as the nuisance continues, which she is legally entitled to possess for $440. She has suffered damages, because of injury to her estate, of $300 per month. Her leasehold previously was worth $360 more per month than she was paying for it, just as many of us own houses bought before inflation which are worth much more than the monthly mortgage payments we make. Now it is worth only $60 per month more than she pays for it, because of the racketeering.

Appraisers frequently testify in condemnation and other cases to reduction in value, as distinguished from price. They call value "economic rent." This figure may be based on comparisons of comparables, replacement cost minus depreciation, and capitalization of income. They distinguish "contract rent," provided for in a lease, which is what the tenant must pay to obtain the value, and which may be higher or lower

than "economic rent." American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 310-15 (6th ed. 1973). The difference between contract rent and economic rent measures the value of the leasehold. *Id.* at 464. The higher the contract rent relative to the economic rent, the more the landlord's reversion is worth. The higher the economic rent relative to the contract rent, the more the tenant's leasehold is worth. *Id.* at 448. Tenancy in a rent controlled apartment has some of the economic characteristics of a long-term lease entered into before a general increase in the price of apartments; part of the value of the reversion is transferred by the rent control law from the landlord to the tenant. *Cf. Yee v. City of Escondido*, 112 S.Ct. 1522, 1529 (1992). The tenant gets a bargain price, and pays less than the apartment is worth.

Appraisers typically determine the value of real estate by locating comparable real estate, adjusting for quality differences, converting prices of the comparables to square foot values, then multiplying this figure by the square footage of the property at issue. *Id.* at 321-22. Using this method, a value, whether for purchase or rental, is found, entirely without reference to the sale or rental price. The value determined tells the interested person, typically a lender, whether the price is high or low relative to value. A bank, for example, may be willing to lend 75% of value, but not 75% of an excessively high price. Thus economic rent and contract rent are independent of each other. *Id.* at 388. The price Oscar and Spinosa pay would not even go into the appraiser's equation. Therefore, injury to the value of the tenant's interest exists independently of what the tenant pays as rent. To find injury to rental value on account of the nuisance, the difference in rental value with and without the racketeering would have to be multiplied by some number of months, but regardless of what might turn out to be the facts regarding future months, both Oscar and Spinosa have pleaded a finite elapsed time which would supply a multiplier.

The amount of crime in the neighborhood is one of the

factors which appraisers consider in determining value. *Id.* at 91. Nor is there anything new in considering the effect of crime on the value of real estate.

> A few decades [after Adam Smith published The Wealth of Nations, in 1776] Patrick Colquhoun reported that agricultural lands near London were worth less than those farther out. That is exactly the opposite of what one would expect because produce from more distant farms had to bear higher transportation costs when it was brought to the city market. His explanation was that the closer a farm was to London, the more of its crop was stolen! Nowadays it is standard procedure to measure the cost of crime to an area by its effect on property values.

George J. Stigler, *Memoirs of an Unregulated Economist* 194 (1988). The possessory interests of tenants as well as the reversionary interests owned by landlords are worth less, under traditional appraisal methods, regardless of whether they pay less, if drug dealing directly affects the property.

The majority is troubled because the tenant cannot sell her rights, so these values and the changes in value cannot be realized in money. But market value "is a standard, not a shackle." Charles T. McCormick, *McCormick on the Law of Damages* § 45, at 170 (1935). The law traditionally recognizes and awards damages, considered purely as property damages, even where the amounts cannot be realized on a market, where for one reason or another the market is not a fair measure of "value to the owner." *Id.* at 171. A common example of a damages award measuring loss of value to property, and treating the amount as damage to property, even though it can never be realized on a market, occurs when personalty for which there is no suitable market is destroyed. The classic example is destruction of clothes in a fire. Though there is a market for used clothing, the price in that market is not a fair measure of the loss, because most people value used clothes of which they have themselves had

the exclusive use much more than they value used clothes worn by strangers. The measure of damages is cost less depreciation, not the price of comparable used clothes in used clothing stores. Dobbs, *supra*, § 5.12, at 390 n.4, 396 n.39 ("real value to the owner and not their market value."). There is no market which can assign a dollar amount to this loss, and it can never be realized, because if a person sells his or her own used clothes, the buyer cannot buy the largest element of value, that of having been the exclusive wearer. Yet the law treats this increment as a proper portion of the damages for injury to property, despite its unrealizability on any market.

Rent control may complicate the appraisal process. The appraiser may have to go farther afield for comparables, outside the area where rents are depressed by controls, and outside the uncontrolled area where rents are increased by immobility of tenants benefitting from rent controls. Navarro, *supra*, at 93. Possibly the appraiser will use pre-control rents, and adjust them according to general fluctuations in real estate rentals in the region, or else will use an empirically based formula applied to replacement cost less depreciation. Expert witnesses customarily make these kinds of judgments and seek to persuade the trier of fact that their judgments are well founded, and we need not anticipate the methodology. What is important to us is that under the customary methods used by experts to value injury to property, no tangible pecuniary loss to the tenants will be needed, and rent control will have no effect except to increase the amount of the loss.

C. Preexistence of the Racketeering

In a footnote, the majority correctly points out that Oscar may not have lost any value, compared to when she moved in, because the alleged drug dealership was operating when she moved in. This would matter only if Congress meant to grandfather in existing racketeering enterprises, a most unlikely proposition. The authorities are divided on the complex questions of apportionment of damages for nuisance

between the tenant and the landlord, and on recovery when the tenant comes to an existing nuisance, where the damages are limited to compensation and the nuisance is a lawful activity. *Bly v. Edison Electric Illuminating Co.*, 172 N.Y. 1 (1902) allows recovery to the tenant who comes to the nuisance, because the alternative "would soon make a person who erects a nuisance the master of all owners or lessees who surround him." *Id.* at 15, 64 N.E. 745. The California Supreme Court, in *Vowinckel v. N. Clark & Sons*, 13 P.2d 733, 737 (Cal.1932), rejected the proposition that the plaintiff who comes to the nuisance cannot recover. See also Keeton, *supra*, § 88B, at 635. Where the nuisance is lawful, considerations of fairness may in some circumstances outweigh those of efficiency, when a suit by a tenant for nuisance seeks to transfer the burden of external diseconomies to their producer. McCormick, *supra*, § 128, at 517-18.

But where the nuisance is racketeering activity, a delicate concern for the economic interests of the criminals would be misplaced. RICO is not a compensatory statute federalizing nuisance law. It explicitly goes beyond the level at which damages would be compensatory, by its treble damages provision. Even if they have not been fortunate enough to have had neighborhoods previously free of drug dealerships, tenants are empowered by RICO to make money by acting as private attorneys general and suing the racketeers for treble damages. The rewards, enhancement of property values in neighborhoods liberated from criminals beyond what they were when the plaintiffs moved in, and money for the tenants and their lawyers who pursue this worthy objective, are incentives precisely within the statutory purpose.

V. Proximate Causation

The majority expresses no view on the ground for dismissal articulated by the District Judge, proximate causation, but under a recent Supreme Court decision, affirmance on this ground would be erroneous. In *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992), the Supreme Court

held that a RICO plaintiff must show that his injury was proximately caused by the defendant's wrong. The Court looked to the Clayton and Sherman Acts and applied "common-law principles of proximate causation," *id.* 112 S.Ct. at 1317, to require "some direct relation between the injury asserted and the injurious conduct alleged." *id.* at 1318. In *Holmes*, the plaintiffs alleged that the defendants' racketeering activity caused the liquidation of two broker-dealers, who were rendered unable to meet their obligations to customers. The Court held that the injury was too remote, because the customers were harmed only by the indirect consequence that the broker-dealers could not afford to pay their bills. *Id.* at 1319.

Holmes must be read together with *Sedima v. Imrex Co.*, 473 U.S. 479 (1985), which establishes that no "racketeering injury" requirement can be inferred from the statutory language, and nothing more is needed than a direct link between the racketeering activity and the injury to business or property. Oscar and Spinosa allege that they were directly harmed by the defendant's pattern of narcotics sales, because the activities necessarily affected immediate neighbors.

Their complaint suggests that the defendant's intentions were to facilitate drug sales, not interfere with neighboring real estate, but that does not eliminate causation. In construing the Clayton Act, the Supreme Court has held that the availability of the remedy "is not a question of the specific intent of the conspirators." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982). Even though the defendants in that case sought a benefit for themselves, and did not have it in mind to harm plaintiff, nevertheless "[t]he harm to McCready and her class was clearly foreseeable" and a "necessary step in effecting ends of the alleged illegal conspiracy." *Id.* It is reasonable to suppose that the defendant, if it did what plaintiffs allege, could foresee harm to plaintiffs' interests in their apartments.

Under *Associated General Contractors v. California State*

Council of Carpenters, 459 U.S. 519 (1983), an analysis of the proximate causation requirement of the Clayton Act includes, among other factors, whether the plaintiffs are in that "class of persons whose self- interest would normally motivate them to vindicate the public interest ... [by performing] the office of a private attorney general." *Id.* at 542. There are no links in the chain of causation between the narcotics sales and harms to Oscar and Spinosa except for the purchasers of narcotics. The narcotics users are unlikely to act as private attorneys general to vindicate the public interest in eliminating the dealers' activities. Oscar and Spinosa are the most directly affected parties likely to fulfill the statutory purpose. The complaint alleged sufficiently direct injury under our precedents. *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir.1991), *petition for cert. filed*, 60 U.S.L.W. 3522, 3536-37 (Jan. 9-10, 13, 1992); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139 (9th Cir.1989) (en banc). This is not to say that all the damages claimed will turn out to have been proximately caused by the conduct. All that plaintiffs need to defeat a Rule 12(b)(6) motion is an allegation of some proximately caused damages, and they have that, with the reduced value of their apartments.

VI. Practical Consequences

My analysis rests upon the transitivity of the language employed in section 1964(c) and the Clayton and Sherman Acts, the meaning of injury to property in the Clayton Act, the classification of the tenants' interests as property, and the ancient classification of the tort of nuisance as injury to property. Is this excursion into the technicalities of common law, and exegesis of concepts of value, practical? A fair test of this formal reasoning would be to compare its result with the majority's to see which better achieves the purposes underlying RICO. If our analyses yield different answers, as they do, then determining whether the answers make any practical sense can help us to determine which solution is more likely correct.

The majority's characterization of interference with the right to use and enjoyment of property as personal injury rather than injury to property precludes anyone likely to have an interest in bringing suit under the statute from suing owners of crack houses and other established narcotics dealerships that blight their neighborhoods. USCA's brief says that Oscar and Spinosa are not directly affected by drug sales to which they are not parties, and "rarely if ever may a civil plaintiff bring a RICO suit based upon alleged narcotic transactions." Appellee's Brief at 15 n.11. Under the majority's analysis, USCA's suggestion is correct. But that does not square with common sense. Under my analysis, those who operate crack houses and narcotics dealerships can expect to have their neighbors take away their money and property by means of RICO suits.

One of the primary purposes underlying the Organized Crime Control Act of 1970, of which RICO formed a part, was combatting the "trade in narcotics" that "causes whole cities virtually to be trapped in their homes by fear of" the maladies associated with drug use. *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 86-87 (1970) (statement of Senator McClellan, the sponsor of S. 30). Improving the quality of residential life in neighborhoods afflicted with narcotics commerce is a statutory purpose, so an accurate construction of the statute should serve that purpose.

It is no accident that the ancient words taken according to their well established meanings in the law do what Congress intended. The words were copied from much older statutes, and carried extensive accretions of common law meanings. Interpreted according to those meanings, the words effect the statutory purpose. Though RICO has been applied to conduct which does not fall within the ordinary English meaning of "racketeering," *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985), here we have the luxury of a case where the "racketeering"

alleged is exactly what Congress intended the statute to scourge.

Many people are too poor to move away when narcotics dealers move into their neighborhood. Their lives are diminished because of the injury to their possessory rights in their dwellings, whether they own or rent. They lose liberty because of fear of crime. Often they cannot move, even into other comparably priced rental dwellings, because their financial circumstances do not enable them to advance moving expenses, and the first and last months' rent and security deposit for a new apartment. They cannot buy their way into suburbs or secured residential compounds, as more affluent people do to escape crime. They rely upon the law to protect the value of their possessory rights in their apartments. The value of this real property interest reflects the quality of life available to those who live in the apartments.

The operation of a massive drug distribution enterprise is exactly the kind of harm against which RICO, with its breadth and draconian penalties, can be useful. Applied in favor of tenants against neighboring drug dealers, RICO is a device for enabling people--including people who may be too poor to own their homes--to fight and destroy the social pathologies that deprive them of liberty and diminish the quality of their lives.

(2)

No. 92-385

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

RUTH E. OSCAR and CHARLES SPINOSA,
Petitioners,

VS.

UNIVERSITY STUDENTS CO-OPERATIVE ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether or not a person can sustain "RICO" type injury within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 as the proximate result of unlawful conduct where:

A. The petitioners are: (1) a tenant for an undisclosed term for an undisclosed rent under an undefined lease in an apartment building; and (2) a former tenant in the same building whose former tenancy is similarly undefined and undisclosed, but who continues to rent a carport under undisclosed circumstances and conditions;

B. The unlawful conduct occurs in a neighboring building by undisclosed persons and is not directed at or intended to cause any harm to the petitioners; and

C. Neither petitioner alleges any direct, concrete financial damage.

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STATEMENT OF THE CASE

The opinion of the court of appeals is based upon a pleading record. Neither petitioner[1] has appended the third amended complaint which was the basis for the opinion of the court of appeals. The district court dismissed the Third Amended Complaint for failure to state a claim under RICO and petitioners declined to amend.[2] Instead, the petitioners acknowledged that their fourth attempt to allege a RICO claim was their best possible effort to plead injury to their business or property and proximate causation, and they appealed.

---

[1] Petitioners Ruth E. Oscar and Charles Spinosa have filed separate petitions. We shall refer to them collectively as "petitioners" unless otherwise specified.

[2] Oscar Pet. 4a, 8a.

Petitioners' allegations of injury to business or property and proximate causation in their third amended complaint are as follows:

> 52. Plaintiffs were injured by defendant in the quiet enjoyment of their leasehold interests. That right of possession is a property right within the meaning of 18 U.S.C. Section 1964. Further, defendant's conduct did not result in plaintiffs paying less rent, because plaintiffs' rents were determined by rent control. Plaintiffs are entitled to recover for decrease in the value of their property caused by defendant's racketeering.
>
> 53. A reasonable person would have reduced desire to rent plaintiffs' apartments because the person would not want to live next door to drug racketeering enterprises and takes that into account when the person makes a decision to lease residential real property. Consequently the drug racketeering alleged in this complaint, which was widely known in the general community, of itself negatively affected the value of the plaintiffs' property interest in their apartments.
>
> 54. A reasonable person would have reduced desire to rent plaintiffs' apartments because of burglary and violence which a reasonable person associates with drug racketeering enterprises and their customers. Consequently the drug racketeering alleged in this complaint proximately negatively affected the value of the plaintiffs' property interest in their apartments through violence, burglary, and the fear of violence and burglary. [Petitioners did not allege that respondent was directly or indirectly responsible for any acts of violence or burglary in their apartment building or carport.]
>
> 55. . . . The drug enterprises thereby lowered the value of plaintiffs' apartments and interfered with plaintiffs' quiet enjoyment of that property.
>
> 56. The racketeering enterprises proximately caused continuing filth, risk of disease, and noise which adversely affected the value of plaintiffs' property. . . .

57. Plaintiffs are entitled to $50,000 for injury to their property, together with treble damages.[3]

Petitioners do not allege any effort to sublet their apartments and carport, they do not allege that they ever intended to do so and they do not allege they were even empowered to do so by the terms of their leases.[4] In fact, they never alleged *any* relevant terms of their leases.

REASONS FOR DENYING THE WRIT

The petitions do not report that the decision of the court of appeals is in conflict with the decision of another court of appeals on the same matter, that the court of appeals has decided a federal question in a way in conflict with a state court of last resort, or that the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure, as to call for the exercise of this Court's power of supervision. Instead, they urge review because petitioners believe the *en banc* decision of the court of appeals was simply wrong. At the same time, they cite no contrary direct authority of this or any other court.

Petitioners fail to recognize that there are two components to a RICO claim: racketeering conduct *and* RICO type injury. They proceed on the apparent assumption that the severity of the first element eviscerates the necessity of the second. No court has ever recognized such a rule of statutory construction and petitioners have referred us to none.

The petitions before this court proceed on a basic misconception: that interference with an individual's personal, noncommercial, non-financial peace of mind and peace and quiet, constitutes "injury to business or property" within the meaning of 18 U.S.C. § 1964(c). The short answer to this contention is that there are no reported decisions of this or any other court supporting petitioners' claims.

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[3] Petitioners' excerpt of record Tab 12.

[4] Oscar Pet. 26a-27a.

The *en banc* opinion of the Ninth Circuit succinctly noted the restrictive scope of the phrase "business or property":

> RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff. Requiring that a plaintiff demonstrate a financial loss to her business or property is consistent with that purpose. It is also consistent with what the Supreme Court has termed the "restrictive significance" of the phrase "injured in his business or property." *Reiter [v. Sonotone Corp.]*, 442 U.S. [330,] 339 [(1979)].

Oscar Pet. 25a.

Petitioners take no issue with the observation of the court of appeals that petitioners have totally failed to allege any direct financial injury because of the alleged racketeering activity. Oscar Pet. 26a-27a. Petitioners have not alleged out-of-pocket expenses of any kind which were allegedly caused, directly or indirectly, by any activity of respondent. Since they do not allege that they have a right to sublet their apartments or carport, or that either of them ever did so, attempted to do so, or even wanted to sublet them, "Any supposed loss is therefore purely speculative." *Id.* 27a. In addition, petitioners have never explained the effect of the local rent control ordinance in Berkeley, California, mentioned in paragraph 52 of the complaint, on their alleged "damage to business or property." In sum, petitioners have never been able to specifically explain their "injury" in such a way that it might be quantified.

It bears noting that the Spinosa petition specifically advised this Court that he "suffered no special financial injury of the sort the court below describes and that rent control prevented him from alienating his leasehold at a profit or loss."[5] Moreover, petitioners simply are unable to establish financial injury because the unlawful conduct of which they complain began long before they moved into their apartments and carport. As noted by the court of appeals:

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[5] Spinosa Pet. 9.

> Oscar thus has not *lost* anything; what she really means is that she *has never had* as much use and enjoyment of her property as she believes she is entitled to. This is yet another step removed from financial loss. [emphasis from tex][6]

No matter how petitioners have attempted to recast their RICO claim, it amounts to no more than interference with their quiet enjoyment of their rental apartments and carport. The court of appeals noted that this does not represent a concrete financial loss (though it may constitute injury to an intangible property interest), does not constitute money paid out as a result of racketeering activity, and is more in the nature of personal injuries which are not compensable under RICO.[7]

Another separate reason why review should be denied is because the petitioners failed properly to allege that any injuries to their property were proximately caused by the racketeering acts, as opposed to other state-law torts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) (plaintiff has standing only if he has been injured in his business or property *by* the conduct constituting the violation). Although this reason was not relied upon by the *en banc* decision of the court of appeals, it is an additional ground for denying review.

RICO was never intended to provide a remedy for every misdeed committed in a residential neighborhood. It does not provide a remedy for unneighborly conduct which might constitute a basis for a nuisance claim under state law. It provides compensation only for damages proximately caused by racketeering activities. The third amended complaint does not allege RICO type injury in that it does not allege that either petitioner was "injured in his business or property" within the meaning of 18 U.S.C. § 1964(c) as a proximate result of respondent's conduct. There is no allegation that respondent's alleged acts were directed at the petitioners or intended to disrupt the quiet enjoyment of their apartments and carport.

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[6] Oscar Pet. 27a(n)4.

[7] Oscar Pet. 23a-25a.

There is no indication that Congress intended to convert state nuisance actions into treble damage racketeering suits in federal court. Although petitioners may have been "injured" in some sense under state law, even if that injury was substantial, this Court recognized that 18 U.S.C. § 1962 was not intended by Congress "to allow all factually injured plaintiffs to recover. . . ." *Holmes v. SIPC*, ____ U.S. ____, 117 L. Ed. 2d 532, 543 (1992). At most, petitioners have suffered only an indirect injury, and allowing their suit "would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.' " *Id.* at 548 (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

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San Francisco, CA

Respectfully submitted,

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